

## Gruesome Speech

Eugene Volokh

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# GRUESOME SPEECH

Eugene Volokh†

*May government officials restrict the public display of “gruesome images” (in the words of one injunction), chiefly of aborted fetuses but also of slaughtered or injured animals? How about gruesome words, for instance signs accusing abortion providers of being “murderers” or “killers”?*

*Some courts have upheld such restrictions, chiefly relying on the perceived need to shield children, the desire to prevent distractions to traffic, or a worry that offended viewers might attack the speakers. Others have struck down such restrictions. This Article argues that such restrictions are generally unconstitutional, though the matter is more complicated on special-purpose government property, such as fairgrounds, advertising spaces, and university campuses.*

INTRODUCTION .....	902
I. THE CONSTITUTIONAL VALUE OF GRUESOME SPEECH .....	903
A. The Constitutional Value of Gruesome Photographs .....	904
B. The Constitutional Value of Visceral Appeals .....	908
II. HOW GRUESOME SPEECH IS RESTRICTED, AND WHETHER SUCH RESTRICTIONS ARE CONTENT-BASED .....	908
A. The Content-Based/Content-Neutral Distinction ....	908
B. Different Kinds of “Gruesome Speech” Restrictions .....	910
1. <i>Express Statutory Prohibitions</i> .....	910
2. <i>Facially Speech-Neutral Laws Triggered           by Gruesome Speech Because of Its Content</i> .....	913
3. <i>Injunctions</i> .....	916
4. <i>Selective Police Enforcement</i> .....	918
5. <i>Enforcement of Broadly Unconstitutional Restrictions           That Apply to a Wide Range of Speech           Beyond Gruesome Speech</i> .....	919

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6. Restrictions on Speech in Nonpublic Fora or Limited Public Fora .....	920
C. The Secondary Effects Doctrine .....	920
III. THE REASONS GIVEN FOR RESTRICTING THE SPEECH .....	922
A. Preventing Attacks on Speakers .....	922
1. The “Fighting Words” Argument .....	922
2. The <i>Feiner v. New York</i> Argument.....	924
B. Preventing Traffic Accidents .....	928
C. Preventing Offense .....	933
1. Generally .....	933
2. “Captive Audience” Arguments .....	934
3. <i>Offensive Speech Undermining People’s</i> <i>Experiences at the Place Being Protested</i> .....	937
D. Preventing Harm to Children.....	940
IV. GRUESOME SPEECH IN NONPUBLIC FORA OR LIMITED PUBLIC FORA.....	947
A. Non-Traditional-Public-Forum Property Generally ...	947
B. Public Colleges and Universities .....	949
CONCLUSION .....	952

## INTRODUCTION

Content-based restrictions on political speech in a public forum are almost always forbidden.<sup>1</sup> Yet recent years have seen a striking, though little-noticed, departure from this norm: some courts have concluded that such restrictions on the public display of “gruesome images,” usually of aborted fetuses, are permissible.<sup>2</sup> Indeed, courts have sometimes even upheld restrictions on gruesome verbal references, such as materials calling abortion providers “murderers.”<sup>3</sup> The restrictions are defended on various grounds: preventing violent

<sup>1</sup> See *infra* Part II.A.

<sup>2</sup> See, e.g., *Frye v. Kan. City Mo. Police Dep’t*, 375 F.3d 785, 790–91 (8th Cir. 2004); *Tatton v. City of Cuyahoga Falls*, 116 F. Supp. 2d 928, 931, 934 (N.D. Ohio 2000); *Saint John’s Church in the Wilderness v. Scott*, 296 P.3d 273, 281–85 (Colo. App. 2012); Preliminary Injunction at 3–4, *Wilkerson v. Scott*, No. 728883, 1999 WL 34994617 (Cal. Super. Ct. June 11, 1999); see also *Olmer v. City of Lincoln*, 192 F.3d 1176, 1180 (8th Cir. 1999) (stating that a restriction on gruesome images focused on shielding young children would be constitutional); *Operation Save America v. City of Jackson*, 275 P.3d 438, 460–61 (Wyo. 2012) (similar).

<sup>3</sup> See *Bering v. SHARE*, 721 P.2d 918, 933–35 (Wash. 1986); *Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 16 Cal. Rptr. 2d 540, 541–42, 547–48 (Ct. App. 1993), *aff’d on other grounds*, 873 P.2d 1224 (Cal. 1994) (noting, 873 P.2d at 1228, that the backers of the injunction didn’t challenge the invalidation of the order restricting the use of the words), *vacated*, 513 U.S. 956 (1994); *O.B.G.Y.N. Ass’n v. Birthright of Brooklyn & Queens, Inc.*, 407 N.Y.S.2d 903, 905–07 (App. Div. 1978) (invalidating a similar injunction). A sample form in the American Jurisprudence encyclopedia specifically provides for such injunctions. 1P1 AM. JUR. PL. & PR. FORMS *Abortion* § 20 (2014).

reactions against the speakers, preventing distraction of drivers, preventing offense to passersby, and (most often) shielding children.<sup>4</sup>

These restrictions offer a good opportunity to think afresh about some important First Amendment issues. When may political speech be restricted in order to protect children? Should speech that has a visceral, emotional impact be less protected than supposedly more rational speech?

Should restrictions on particular images or words be treated as generally permissible “manner” restrictions, or should they be treated as content-based and thus almost always unconstitutional? Are there particular places where speech may be more constrained, even in content-based ways? And, of course, besides these broader questions, there is also the narrower but important concrete issue: Are these restrictions improperly restricting vivid criticism of abortion—and, increasingly, vivid criticism of the supposed mistreatment of animals?

This Article aims to address all these questions. It begins, in Part I, by describing why gruesome speech merits full First Amendment protection and why restrictions on such expression are generally properly treated as subject to strict scrutiny. It then discusses, in Part II, the kinds of “gruesome speech” restrictions that governments have recently imposed, and that some courts have allowed, and concludes that most such restrictions should be viewed as content-based.

Part III turns to the justifications that have been offered for restricting such speech: preventing offense, preventing violent attacks by angry viewers, preventing driver distraction and thus traffic accidents, and protecting children from emotional disturbance. These justifications, the Article argues, do not suffice to justify such speech restrictions. And Part IV discusses restrictions limited to government-owned property (other than parks and sidewalks), including fairs, advertising spaces, and the special case of public colleges and universities; some such restrictions are constitutional but some are not.

## I

### THE CONSTITUTIONAL VALUE OF GRUESOME SPEECH

First Amendment doctrine has gotten complex. Later Parts will discuss the doctrinal complexities, for instance in deciding whether gruesome speech restrictions should be treated as content-based or content-neutral,<sup>5</sup> whether the “secondary effects” doctrine applies here,<sup>6</sup> and whether certain government interests can justify such restrictions.<sup>7</sup>

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<sup>4</sup> See *infra* Part III.

<sup>5</sup> See *infra* Part II.A.

<sup>6</sup> See *infra* Part II.C.

<sup>7</sup> See *infra* Part III.

But regardless of the formal rules, one question observers (judges, academics, legislators, citizens) usually have is this: Would allowing such speech restrictions—and, in particular, the more common restrictions on gruesome images rather than just gruesome words—risk significantly impoverishing public debate? The answer, I think, is yes.

#### A. The Constitutional Value of Gruesome Photographs

To begin with, photographs can expose that which is otherwise hidden, with a vividness that words often cannot capture; images of aborted fetuses are an especially apt example. Even some pro-abortion-rights commentators (a group in which I place myself) acknowledge that much of the public support for abortion stems from the natural human reaction, “out of sight, out of mind.” As Professor Laurence Tribe writes,

Many [people], who can readily envision the woman and her body, who cry out for her right to control her destiny, barely envision the fetus within that woman and do not imagine as real the life it might have been allowed to lead. For them, the life of the fetus becomes an . . . invisible abstraction.<sup>8</sup>

Likewise, Frances Kissling, former president of Catholics for a Free Choice, and Kate Michelman, former president of the National Abortion Rights Action League, wrote,

In the 1970s, . . . [t]he fetus . . . stayed largely invisible. . . . Science facilitated the swing of the pendulum. Three-dimensional ultrasound images of babies in utero began to grace the family fridge. . . . These trends gave anti-abortionists an advantage, and they made the best of it. . . . Advocates of choice have had a hard time dealing with the increased visibility of the fetus.<sup>9</sup>

A born baby is visible, and leaves a visible body if it is killed. Fetuses are invisible while they are developing in the womb, and they are generally disposed of quickly after an abortion, so they remain unseen even then. Foreign wars and factory farms—and, in earlier times, slavery and lynchings—are likewise something far away from most of us, something we do not focus on until we see it concretely depicted.

And gruesome images often reflect gruesome deeds. One powerful way of opening people’s eyes to what the speaker sees as cruelty is by showing them pictures of the results of that cruelty—pictures that are often gruesome.

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<sup>8</sup> LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 5 (1990).

<sup>9</sup> Frances Kissling & Kate Michelman, *Opening the Discussion to the Real Conflict Between Life and Choice*, ST. PAUL PIONEER PRESS, Jan. 23, 2008, at B9.

Thus, for instance, the photograph of Gordon, a runaway slave with horrific whipping scars on his back, was widely distributed during the Civil War as “visual proof of abolitionists’ claims of the cruelties of slavery.”<sup>10</sup> Photographs of lynching victims likewise showed the evil of lynching in a way that words could not. “[O]ne horrific apparition after another makes visceral what one dares not imagine.”<sup>11</sup> Many of the photographs showed the victims’ bodies still hanging.<sup>12</sup>

Emmett Till’s mother, reacting to her son’s lynching in 1955, displayed her son’s body in a glass-topped casket “so mourners could see her son’s ghastly injuries. Photographs of Till’s body in the coffin published in *Jet Magazine* became powerful images of the civil rights movement.”<sup>13</sup> As Till’s cousin would later say, “[N]o one would have believed it if they didn’t [see] the picture or didn’t see the casket. . . . [W]e was always as a people, African Americans, was fighting for our civil rights, but now we had the whole nation behind us.”<sup>14</sup>

Photographs of Holocaust victims similarly helped show the evil of Nazism in ways words could not easily convey. In the words of playwright Arthur Miller,

[During World War II], it was by no means an uncommon remark that we had been maneuvered into this war by powerful Jews who secretly controlled the Federal Government. Not until Allied troops had broken into the German concentration camps and the newspapers published photographs of the mounds of emaciated and

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<sup>10</sup> Gordon, NAT’L PORTRAIT GALLERY, <http://npgportraits.si.edu/eMuseumNPG/code/emuseum.asp?rawsearch=ObjectID/./is/./93273/./false/./false&newprofile=CAP&newstyle=single> (last visited Mar.12, 2015); see generally Frank H. Goodyear, III, *Photography Changes the Way We Record and Respond to Social Issues*, SMITHSONIAN INST., <https://web.archive.org/web/20131016065309/http://click.si.edu/Story.aspx?story=297> (archived Oct. 26, 2013) (describing the history and impact of the Gordon portrait). For contemporaneous reproductions of the Gordon portrait, see FRANCES ANNE KEMBLE, *THE VIEWS OF JUDGE WOODWARD AND BISHOP HOPKINS ON NEGRO SLAVERY AT THE SOUTH*, at title page (1863); *A Typical Negro*, HARPER’S WKLY., July 4, 1863, at 429.

<sup>11</sup> Mary Thomas, *Art Review: ‘Without Sanctuary’ Digs Deeply into Painful Issues of Inhumanity*, PITTSBURGH POST-GAZETTE (Sept. 29, 2001), <http://old.post-gazette.com/ae/20010929thomas0929fnp5.asp>. In the 1800s, racists used photographs of lynchings to intimidate blacks, but by the 1910s anti-lynching activists began to use such photographs to mobilize public opinion against lynching. See ASHRAF H. A. RUSHDY, *THE END OF AMERICAN LYNCHING* 62–70 (2012).

<sup>12</sup> See RUSHDY, *supra* note 11, at 62–70.

<sup>13</sup> *No Rest for Lynching Victim Who Sparked Civil Rights Movement: Corpse Caught up in Chicago Graveyard Scandal*, DAILY MAIL (July 14, 2009), <http://www.dailymail.co.uk/news/article-1199570/No-rest-lynching-victim-sparked-civil-rights-movement-Corpse-caught-Chicago-graveyard-scandal.html>.

<sup>14</sup> Abby Callard, *Emmett Till’s Casket Goes to the Smithsonian*, SMITHSONIAN (Nov. 2009), <http://www.smithsonianmag.com/arts-culture/emmett-tills-casket-goes-to-the-smithsonian-144696940/>.

sometimes partially burned bodies was Nazism really disgraced among decent people and our own casualties justified.<sup>15</sup>

Photographs of those who died or were gruesomely injured during the Vietnam War likewise affected public opinion in a way words could not. “[P]ictures of victims—of a Buddhist monk immolating himself, of a napalmed Vietnamese girl running in terror along a highway, and . . . of a terrorist being shot by a general—helped turn public opinion against the war.”<sup>16</sup> During World War II, some gruesome war photographs were used to exhort Americans to greater efforts during the war; one poster, for instance, “featured a dead American soldier, slumped face down over a berm, his back flecked with what might be blood.”<sup>17</sup>

More recently, *Time* magazine displayed on its cover a portrait of a woman who had had her nose cut off by the Taliban for escaping her abusive in-laws; the cover bore the caption, “What Happens if We Leave Afghanistan.”<sup>18</sup> The editor explained that he chose to print the image, despite the fact that it “will be seen by children, who will undoubtedly find it distressing,” because,

[T]he image is a window into the reality of what is happening—and what can happen—in a war that affects and involves all of us. I would rather confront readers with the Taliban’s treatment of women than ignore it. I would rather people know that reality as they make up their minds about what the U.S. and its allies should do in Afghanistan.<sup>19</sup>

And indeed this is what many of the speakers who choose to use “gruesome images” want to do: They want to show people the reality of what they see as an atrocity—lynchings, abortion, war, abuse of animals—that affects and involves all of us. They likewise would rather “confront readers” with America’s treatment of, say, fetuses or animals than “ignore it.”<sup>20</sup> And they would rather people know that reality when deciding what we should do about the object of their criticism.<sup>21</sup>

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<sup>15</sup> Arthur Miller, *The Face in the Mirror: Anti-Semitism Then and Now*, N.Y. TIMES, Oct. 14, 1984, at BR3.

<sup>16</sup> Jefferson Hunter, *Disturbing Images of Men in Combat*, NEWSDAY, Mar. 5, 1989, at 23 (reviewing SUSAN MOELLER, *SHOOTING WAR* (1989)).

<sup>17</sup> Brief for Historians of Art and Photography as Amici Curiae Supporting Petitioners at 7, *Scott v. Saint John’s Church in the Wilderness*, 133 S. Ct. 2798 (2013) (No. 12-1077), 2013 WL 1412096. For a reproduction of the poster, see <http://airandspace.si.edu/webimages/collections/full/A19900856000cp02.jpg>.

<sup>18</sup> Jodi Bieber, *Portrait of Aisha, 18* (photograph), TIME, Aug. 9, 2010, cover.

<sup>19</sup> Richard Stengel, *What’s Hard to Look At*, TIME, Aug. 9, 2010, at 4.

<sup>20</sup> *Id.*

<sup>21</sup> See generally *Swagler v. Neighoff*, 398 F. App’x 872, 881 (4th Cir. 2010) (“[T]he ‘pure speech’ quality of images of a dismembered fetus (at least as the image is deployed in the pro-life movement) counsels our respect for Appellees’ claims.” (citations omitted)).

Of course, many viewers might disagree with the claim that these images are evidence of evil actions. Many might think, for instance, that the deaths or injuries depicted by the images are the result of reproductive freedom, just and necessary war, or the permissible consumption of animals.<sup>22</sup>

But whether or not these images persuade each viewer, they have the potential to persuade some. Anti-abortion activists believe that the way to portray what they see (whether rightly or wrongly) as the brutality and inhumanity of abortion—and the personhood of the fetus—is to show exactly what the abortion produces. Animal rights activists believe much the same about pictures of dead, injured, or abused animals.<sup>23</sup> Words, especially words on a sign glimpsed by a passerby, cannot effectively capture that. A photograph can.

Restrictions on gruesome images thus target content that speakers reasonably see as critical to their underlying message.<sup>24</sup> In *Cohen v. California*, the Court speculated that “forbid[ding] particular words” will create “a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.”<sup>25</sup> That is as true, perhaps even more true, when it comes to restrictions on particular images.<sup>26</sup>

Likewise, *Texas v. Johnson* held that free speech protection “is not dependent on the particular mode in which one chooses to express an idea,” partly because “messages conveyed without use” of certain

<sup>22</sup> They might also argue that the photographs are misleading, for instance if photographs of late-term aborted or miscarried fetuses are used to condemn early-term abortions. But of course those who think late-term abortions and early-term abortions are morally equivalent, or at least morally similar, would argue that showing the gruesomeness of one also sheds light on the other.

<sup>23</sup> See, e.g., *Showing Animals Respect & Kindness v. City of West Hollywood*, 83 Cal. Rptr. 3d 134, 136–37 (Ct. App. 2008) (describing use of such pictures in a campaign against animal cruelty); cf. Larry Sandler, *Graphic PETA Protest OK'd at Milwaukee Meat Plant*, MILWAUKEE J. SENTINEL, May 5, 2011 (describing an animal rights protest, which an alderman unsuccessfully tried to restrict, that “plan[ned] to show naked people—with their private parts concealed—covered in fake blood, lying on trays and wrapped in plastic sheets as if they were cuts of meat for sale in a butcher shop”).

<sup>24</sup> [T]here is no doubt that those signs displaying pictures of aborted fetuses were essential to Plaintiffs’ message. The reaction of the crowd alone demonstrates that Plaintiffs’ message, which, according to Plaintiffs, was intended to shock the public’s [conscience] through the “display of human carnage,” was effective while the signs were displayed. *Grove v. City of York*, 342 F. Supp. 2d 291, 304 (M.D. Pa. 2004). “Plaintiffs’ pictures depicting aborted fetuses are some of Plaintiffs’ most effective speech.” *Id.* at 304 n.4.

<sup>25</sup> 403 U.S. 15, 26 (1971).

<sup>26</sup> See *Becker v. FCC*, 95 F.3d 75, 81 (D.C. Cir. 1996) (“In many instances, of course, it will be impossible to separate the message from the image, when the point of the political advertisement is to call attention to the perceived horrors of a particular issue. Indeed, this was the apparent purpose of many of the candidates who ran abortion advertisements similar to Mr. Becker’s.”).

visual imagery may be less forceful than “those conveyed with it.”<sup>27</sup> What is true of the distinct value of flag burning is at least as true for the distinct value of images of death and injury.

### B. The Constitutional Value of Visceral Appeals

Photographs, of course, are not syllogisms. Photographs of awful things aim at awakening viewers’ consciences with an appeal to deeply seated emotional reactions and moral intuitions. The images are not rationalistic debate. They would not be at home in a university economics or philosophy department.

Yet how many people’s opinions about abortion, animal rights, or even pacifism stem entirely from rationalistic debate? Much of what we believe comes not just from logic but from experience—from what we have seen, and from the visceral moral reactions that this seeing has aroused. Photographs, even of gruesome things, are unparalleled in their ability to make us see things that we otherwise might have ignored.

*Cohen*, again, is helpful here. In *Cohen*, the Court stressed that the Constitution protects not just “the cognitive content” of speech, but also “that emotive function which, practically speaking, may often be the more important element of the overall message.”<sup>28</sup> Sound as that analysis was as to the vulgarity in *Cohen*, it is doubly sound as to pictures intended to trouble the conscience and inspire radical rethinking of beliefs.

## II

### HOW GRUESOME SPEECH IS RESTRICTED, AND WHETHER SUCH RESTRICTIONS ARE CONTENT-BASED

#### A. The Content-Based/Content-Neutral Distinction

Gruesome speech, then, has serious constitutional value. Part III will turn to whether there are sufficiently powerful reasons for restricting the speech despite that value. But for now, this Part will consider (a) just what kinds of restrictions are sometimes imposed on such speech, and (b) whether those restrictions should be seen as content-based or content-neutral.

The distinction between content-based and content-neutral rules has become famously critical in recent decades. Some have argued that it has gotten too prominent;<sup>29</sup> and it can indeed sometimes seem

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<sup>27</sup> 491 U.S. 397, 416 & n.11 (1989).

<sup>28</sup> 403 U.S. at 26.

<sup>29</sup> See, e.g., Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1352 (2006) (“[A]n obsessive focus on content regulation . . . is not the best way to protect and promote a healthy and vibrant system of free expression.”); Martin H. Redish, *The Content Distinction in First*

aridly scholastic. Instead of focusing on what seem like the core First Amendment issues—the constitutional value of speech, the harm that the speech can cause, or the tradition of constitutional protection or restriction—talk of content discrimination can often get into technical statutory parsing, and sometimes metaphysical-seeming debates about what is a “secondary” and what is a “primary” effect.

But the distinction is doctrinally significant, and it does capture important First Amendment concerns.<sup>30</sup> Most significantly for our purposes, the content discrimination inquiry generally reflects the notion that, while non-content elements of speech (such as its volume, and even its time or location) are in large measure fungible, the content elements are not.

Content-neutral “time, place, and manner” restrictions that leave open “ample alternative channels” for speakers, the Court has often held, are usually constitutional, subject only to a deferential form of intermediate scrutiny.<sup>31</sup> The premise of this rule is that such restrictions don’t substantially burden speakers (or public debate), precisely because they leave open ample alternative channels.

To be sure, people using these alternative channels might be unable to say things precisely how they want to say them: by using loud sound amplification, by using a large crowd of protesters, by sleeping in the park, by burning a draft card. Still, the same messages can still be pretty effectively conveyed, and using the same words or images that the speaker wants to use.<sup>32</sup>

But content-based restrictions are subject to much more demanding scrutiny, partly because particular words are *not* seen as fungible. *Cohen v. California*, for instance, struck down a ban on the use of vulgarities precisely because such a ban would limit people’s abilities to express emotions that may be “otherwise inexpressible.”<sup>33</sup> To use an example given by a later opinion, “I Strongly Resent the Draft” is just not a substitute for “Fuck the Draft.”<sup>34</sup>

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*Amendment Analysis*, 34 STAN. L. REV. 113, 128 (1981) (“[E]ither restriction reduces the sum total of information or opinion disseminated.”).

<sup>30</sup> See Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1304–10 (2005).

<sup>31</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 797 (1989) (internal quotation marks omitted).

<sup>32</sup> For instance, the defendant in *United States v. O’Brien*, 391 U.S. 367 (1968), was only barred from burning his original draft card; he remained free to burn a copy of the draft card, which would have had the same appearance and the same text.

<sup>33</sup> 403 U.S. 15, 26 (1971).

<sup>34</sup> *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 569 (1987) (Brennan, J., dissenting) (quoting *Int’l Olympic Comm. v. S.F. Arts & Athletics*, 789 F.2d 1319, 1321 (9th Cir. 1986) (Kozinski, J., dissenting from the denial of rehearing en banc) (referring to the facts of *Cohen*, 403 U.S. at 16)).

Likewise, *Texas v. Johnson* rejected the dissent's argument that a ban on flag burning permissibly "deprived Johnson of only one rather inarticulate symbolic form of protest" and thus "left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy."<sup>35</sup> "[M]essages conveyed without use of the flag," the majority responded, "are not 'just as forcefu[l]' as those conveyed with it."<sup>36</sup>

Gruesome speech, as Part I has argued, is likewise not fungible with milder arguments—it likewise conveys "otherwise inexpressible" messages, and the alternatives to such speech "are not 'just as forcefu[l].'" Restrictions on such speech thus especially affect public debate, by restricting a unique form of content in that debate. And, as the material below will argue, such restrictions are properly seen as content-based.

## B. Different Kinds of "Gruesome Speech" Restrictions

### 1. *Express Statutory Prohibitions*

Some restrictions on gruesome speech are expressly set forth in statutes or ordinances.<sup>37</sup> Thus, for instance, on some occasions Michigan police officers have ordered people to stop displaying pictures of aborted fetuses and of concentration camp victims,<sup>38</sup> citing a statute that provides,

Any person who shall . . . display . . . [in a] public place, any sign, picture, printing or other representation of murder, assassination, stabbing, fighting or of any personal violence, or of the commission of any crime, . . . shall be guilty of a misdemeanor.<sup>39</sup>

This particular statute is obviously overbroad: it is hard to imagine a government interest that would suffice to justify banning all representations of any violence. Likely because of this breadth, Michigan officials have conceded that the statute is unconstitutional.<sup>40</sup>

But one can imagine a similar statute that was limited to gruesome images,<sup>41</sup> images of dead bodies, or some similar relatively

<sup>35</sup> 491 U.S. 397, 432 (1989) (Rehnquist, C.J., dissenting).

<sup>36</sup> *Id.* at 416 n.11 (majority opinion) (alteration in original).

<sup>37</sup> I will use "statutory" as shorthand for "implemented by statute or by local ordinance."

<sup>38</sup> *Brock v. Cox*, No. 1:09-cv-00310-PLM, 2009 WL 1456472, at \*1–2 (W.D. Mich. May 22, 2009); Plaintiff's Memorandum of Law in Support of Motion for Preliminary Injunction with Supporting Affidavit at 2–4, *Norton v. Granholm*, No. 4:01-cv-00172-DWM (W.D. Mich. Nov. 19, 2001).

<sup>39</sup> MICH. COMP. LAWS § 750.38 (2014).

<sup>40</sup> Consent Judgment at 2, *Brock v. Cox*, No. 1:09-cv-00310-PLM (W.D. Mich. May 29, 2009); Consent Judgment & Stipulated Permanent Injunction Order at 1, *Norton v. Granholm*, No. 4:01-cv-00172-DWM (W.D. Mich. Feb. 8, 2002).

<sup>41</sup> Several Los Angeles suburbs and one town in Washington bar public display of "any picture, illustration or delineation of . . . any murder, suicide, robbery, holdup, shooting,

narrow category, and even limited to situations where children are in the audience. Perhaps this is what the Eighth Circuit had in mind when it said that an ordinance “narrowly tailored to prohibit only that sort of speech that would be psychologically damaging to children” would be constitutional.<sup>42</sup>

Under well-established First Amendment doctrine, such statutes are content-based because they ban depictions of particular acts or things.<sup>43</sup> Bans on publicly showing moving images that contain nudity are treated as content-based.<sup>44</sup> Bans on publicly displaying profanity are treated as content-based.<sup>45</sup> Bans on distributing

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stabbing, clubbing or beating of any human being, wherein any such act is shown in gruesome detail or in a revolting manner, or in any manner objectionable to the moral sense,” though I have not found any evidence of any prosecutions under these laws. *See, e.g.*, BELL GARDENS, CAL., MUN. CODE § 5.50.020 (2014); COSTA MESA, CAL., MUN. CODE § 9-219(b) (2014); LOMITA, CAL., MUN. CODE § 6-4.13(b) (2014); PARAMOUNT, CAL., MUN. CODE § 8-10 (2007); SAN DIMAS, CAL., MUN. CODE § 5.40.080 (2014); LYNDEN, WASH., MUN. CODE § 5.08.060 (2014). There were once similar ordinances in Los Angeles and Houston. *See* L.A., Cal., Ordinance 38,315 (June 25, 1918); HOUS., TEX., REV. CODE OF ORDINANCES § 1442 (1922). The earliest such ordinance I could find was in Covina, California, a Los Angeles suburb, *see Ordinance No. 102*, COVINA ARGUS, Mar. 23, 1912, at 3; similar ordinances were also enacted for censorship of movies, *see, e.g.*, *City of Seattle v. Smythe*, 166 P. 1150, 1150–51 (Wash. 1917) (quoting a Seattle ordinance that was enacted in 1916 or earlier); RICHARD HENRY EDWARDS, POPULAR AMUSEMENTS 150 (1915) (citing a City of North Yakima ordinance).

<sup>42</sup> *Olmer v. City of Lincoln*, 192 F.3d 1176, 1180 (8th Cir. 1999); *see also id.* at 1180–81 (endorsing the analysis of the district court, *Olmer v. City of Lincoln*, 23 F. Supp. 2d 1091, 1100–01 (D. Neb. 1998), which discussed this in more detail).

<sup>43</sup> I do not read *Olmer* as disagreeing with this; indeed, its claim that the law can be justified by a “compelling” government interest, 192 F.3d at 1180, is consistent with strict scrutiny, the test applicable to content-based speech restrictions. Part III.D further discusses whether such a law, justified by a desire to shield children, should indeed pass strict scrutiny.

<sup>44</sup> *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 (1975).

<sup>45</sup> *See Cohen v. California*, 403 U.S. 15, 18 (1971); *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (describing *Cohen* as involving punishment based on “the offensive content” of the speaker’s profane message); *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000) (citing *Cohen* in the discussion of the way “content-based speech restriction[s]” aimed at offensive speech are treated); *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (holding that, “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content,” and citing *Cohen* as the first example supporting that proposition).

In one instance that I know of, a person who was displaying gruesome images was indeed arrested under a statute that restricted vulgarities: Robert Dean Roethlisberger Jr. was arrested on the theory that his “driving a truck emblazoned with images of aborted fetuses” was disorderly conduct, apparently on the theory that it constituted “us[ing] obscene and vulgar or profane language in the presence of . . . a person under the age of 14 years which threatens an immediate breach of the peace,” prohibited by GA. CODE ANN. § 16-11-39 (2014). *See Charges Dropped Against Anti-Abortion Trucker*, NBCNEWS.COM (Dec. 4, 2007), [http://www.nbcnews.com/id/22101565/ns/us\\_news-crime\\_and\\_courts/t/charges-dropped-against-anti-abortion-trucker/](http://www.nbcnews.com/id/22101565/ns/us_news-crime_and_courts/t/charges-dropped-against-anti-abortion-trucker/). But the charges were dropped shortly afterwards, because the prosecutor rightly concluded that “the physical display of the images in ques-

to minors video games that depict violence are treated as content-based.<sup>46</sup>

All these restrictions are viewpoint-neutral—they ban pictures of nudity, vulgarities, or violent images without regard to the viewpoint that the words or images are used to convey. But they are nonetheless content-based.<sup>47</sup> Likewise, a ban on the public display of images that depict death or gore is content-based. Content-neutral restrictions on the “manner” of speech are judged under a more deferential standard, and may often be constitutional.<sup>48</sup> But when the law defines a prohibited “manner” of communication based on the content of speech (whether that content includes depictions of nudity, vulgarity, violence, death, or blood), the law is subject to the scrutiny applicable to content-based restrictions.<sup>49</sup>

The same is true even if the statute is viewed as a “place” restriction, on the grounds that it only restricts a certain kind of speech in public places. Indeed, one can imagine narrower statutes—perhaps

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tion—as shocking and offensive as they are—does not constitute ‘obscene and vulgar or profane language’ as specifically prohibited by this statute.” *Id.*

<sup>46</sup> See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2733 (2011).

<sup>47</sup> See, e.g., *Burson v. Freeman*, 504 U.S. 191, 197–98 (1992); *Boos v. Barry*, 485 U.S. 312, 319–21 (1988); *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987); *Carey v. Brown*, 447 U.S. 455, 462 & n.6 (1980); *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 537–38 (1980).

<sup>48</sup> See *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 764 (1994); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); see also *Foti v. City of Menlo Park*, 146 F.3d 629, 640–42 (9th Cir. 1998) (upholding content-neutral ordinance limiting each protester to one sign that is at most three square feet in area, justified partly by an interest in “traffic safety”); *World Wide Street Preachers’ Fellowship v. Town of Columbia*, 411 F. Supp. 2d 671, 677 (W.D. La. 2006) (concluding that a content-neutral ban on standing in the street could be applied to protesters displaying pictures of aborted fetuses), *rev’d in part*, 245 F. App’x 336, 348–49 (5th Cir. 2007) (concluding that the ban may have in fact been applied based on the content of the protesters’ speech); *Tompkins v. Cyr*, 995 F. Supp. 664, 682 (N.D. Tex. 1998) (concluding that defendants were properly held liable for intentional infliction of emotional distress based on their residential picketing, citing *Frisby v. Schultz*, 487 U.S. 474 (1988), which had treated a blanket ban on residential picketing as content-neutral); *Showing Animals Respect & Kindness v. City of W. Hollywood*, 83 Cal. Rptr. 3d 134, 137 (Ct. App. 2008) (upholding a content-neutral ban on mobile billboards, justified by the government interest in reducing traffic, in a case brought by a group that wanted to drive around billboards showing “scenes of animal abuse”); *Horizon Health Ctr. v. Felicissimo*, 622 A.2d 891, 901–03 (N.J. Super. Ct. App. Div. 1993) (concluding that a content-neutral limit on protests outside an abortion clinic could be applied, given the risk of physical intimidation flowing from past such protests, but stressing that the restriction had to be content-neutral).

<sup>49</sup> See, e.g., *AIDS Action Comm. of Mass., Inc. v. Mass. Bay Transp. Auth.*, 42 F.3d 1, 8 (1st Cir. 1994) (“Although it might be reasonable, in an analytical vacuum, to characterize a prohibition on the use of sexually explicit or patently offensive language to communicate an idea as a limitation on the ‘manner’ in which a speaker may speak, such a characterization flies in the face of how the Supreme Court has construed the concept of manner through case-by-case adjudication. The Court has defined the term narrowly, making clear that, in order to be considered a valid manner restriction, a regulation cannot be aimed at the communicative impact of expressive conduct.” (citation omitted)).

limited to space around schools, medical facilities, or churches—that only ban speech in a few places. But while a content-neutral restriction on the place of speech could be upheld under a relatively deferential form of intermediate scrutiny, content-based place restrictions are subject to strict scrutiny.<sup>50</sup>

2. *Facially Speech-Neutral Laws Triggered by Gruesome Speech Because of Its Content*

Some gruesome speech cases involve police or prosecutors applying facially speech-neutral prohibitions, but doing so on the grounds that the content of the speech angers or distresses viewers and thus causes the harms that the prohibitions seek to avoid.

Sometimes, the prohibitions ban disrupting certain government functions. Thus, for instance, in *Center for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Department*, police officers had ordered anti-abortion protesters to stop displaying gruesome images outside schools, on the theory that such displays violated a statute that banned “disrupt[ing a] school or its pupils or school activities.”<sup>51</sup> Likewise, in *Gabriel v. City of Plano*, police officers ordered that an anti-abortion protester leave the sidewalk outside a school, because he was violating a law that banned “disrupt[ing] the conduct of classes or other school activities.”<sup>52</sup>

Sometimes the laws ban “disturbing the peace” or “disorderly conduct.” This was the rationale offered by the government in *City of Williston v. Rudnick*,<sup>53</sup> *Lefemine v. Davis*,<sup>54</sup> *Swagler v. Neighoff*,<sup>55</sup> *O’Toole v. Superior Court*,<sup>56</sup> *Tatton v. City of Cuyahoga Falls*,<sup>57</sup> and *Commonwealth v. Jarboe*.<sup>58</sup> In *Jarboe*, for instance, a protester was convicted for “disorderly conduct” for “patrolling the public sidewalk adjacent to [a hospital], . . . carrying a sandwich board depicting on one side colored photos of aborted fetuses and on the other her protestations.”<sup>59</sup> The alleged breach of the peace might be the offensiveness of the material

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<sup>50</sup> See, e.g., *Carey*, 447 U.S. at 460–62 (finding a prohibition on picketing residential neighborhoods to be content-based and applying strict scrutiny).

<sup>51</sup> 533 F.3d 780, 791 (9th Cir. 2008) (quoting CAL. PENAL CODE § 626.8 (West 2012)).

<sup>52</sup> 202 F.3d 741, 744 & n.6 (5th Cir. 2000) (quoting TEX. EDUC. CODE ANN. § 37.124 (West 1996)).

<sup>53</sup> No. 53-2014-CR-01987 (N.D. Dist. Ct. dismissed Feb. 2, 2015).

<sup>54</sup> 732 F. Supp. 2d 614, 622–23 (D.S.C. 2010), *aff’d sub nom.* *Lefemine v. Wideman*, 672 F.3d 292 (4th Cir. 2012), *rev’d as to attorney fees*, 133 S. Ct. 9 (2012).

<sup>55</sup> 398 F. App’x 872, 876 (4th Cir. 2010).

<sup>56</sup> 44 Cal. Rptr. 3d 531, 535, 550 (Ct. App. 2006).

<sup>57</sup> 116 F. Supp. 2d 928, 932, 934–35 (N.D. Ohio 2000).

<sup>58</sup> 12 Pa. D. & C.3d 554, 556 (Ct. Com. Pl. 1979).

<sup>59</sup> *Id.* at 555.

as such,<sup>60</sup> the alleged disturbance to children,<sup>61</sup> or the risk of a violent reaction by angry viewers.<sup>62</sup>

Sometimes the laws ban interfering with traffic because of driver reaction to the content of the signs. In *Swagler v. Neighoff*, for instance, the police arrested protesters for disorderly conduct and for impeding traffic,<sup>63</sup> based on their display of “signs depicting aborted fetuses.”<sup>64</sup> And sometimes the legal rules might even be tort causes of action, such as nuisance, applied on the theory that the signs unreasonably interfered with property owners’ and their guests’ use of their land.<sup>65</sup>

Of course, when a protest disrupts government functions, disturbs the peace, or blocks traffic through its non-content elements—for instance, because it’s loud or because protesters block building entrances—the protest can indeed be restricted. There, the restriction is being applied in a content-neutral way.<sup>66</sup>

But when the disruption or disturbance stems precisely from the emotional impact of words or images, the law is being applied in a content-based way, and the application is thus presumptively unconstitutional.<sup>67</sup> Indeed, this is what happened in many of the leading First Amendment “disturbing the peace” precedents.

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<sup>60</sup> See, e.g., *Lefemine v. Davis*, 732 F. Supp. 2d 614, 624 (D.S.C. 2010), *aff’d sub nom.* *Lefemine v. Wideman*, 672 F.3d 292 (4th Cir. 2012), *rev’d as to attorney fees*, 133 S. Ct. 9 (2012). For a related arrest on a “harassment” charge, see Mike Frassinelli, *Anti-Abortion Activist Won’t Face Charge*, MORNING CALL (Allentown, Pa.), Aug. 22, 2001, which noted that the police charged someone with “harassment” for displaying aborted fetuses but then withdrew the charge. The seemingly relevant provision of the Pennsylvania harassment statute, 18 PA. CONS. STAT. § 2709(a)(3) (2010), bars any “course of conduct or repeated[ ] commi[ssion] of acts which serve no legitimate purpose” and which are engaged in “with intent to harass, annoy or alarm another.”

<sup>61</sup> See, e.g., *Lefemine*, 732 F. Supp. 2d at 622–24 (reasoning that such a restriction might be constitutional, if limited to situations where children are indeed likely to see the signs).

<sup>62</sup> See, e.g., *Tatton*, 116 F. Supp. 2d at 934.

<sup>63</sup> 398 F. App’x 872, 875–76 (4th Cir. 2010).

<sup>64</sup> *Swagler v. Sheridan*, 837 F. Supp. 2d 509, 526 (D. Md. 2011).

<sup>65</sup> See *Saint John’s Church in the Wilderness v. Scott*, 296 P.3d 273, 275 (Colo. App. 2012); *cf.* *State v. Otterstad*, 734 N.W.2d 642, 643–44 (Minn. 2007) (overturning conviction of anti-abortion protesters under a criminal public nuisance law).

<sup>66</sup> See, e.g., *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 768–70 (1994) (obstruction of traffic); *Ward v. Rock Against Racism*, 491 U.S. 781, 792 (1989) (noise).

<sup>67</sup> See, e.g., *Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep’t*, 533 F. 3d 780, 793 (9th Cir. 2008) (holding that the application of a disturbing-schools law in such a situation would be content-based, and reversing on this point *Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff’s Dep’t*, No. SACV-03-386-GLT, 2003 WL 25755568, at \*4 (C.D. Cal. Oct. 22, 2003), which held the contrary); *Commonwealth v. Jarboe*, 12 Pa. D. & C.3d 554, 558 (Ct. Com. Pl. 1979) (holding likewise as to disorderly conduct); *City of Williston v. Rudnick*, No. 53-2014-CR-01987 (N.D. Dist. Ct. dismissed Feb. 2, 2015) (dismissed disorderly conduct charge without written opinion, but in response to a motion to dismiss that argued the defendant’s display of a gruesome image of an aborted fetus was protected by the First Amendment).

In *Cohen v. California*, for instance, Cohen had been prosecuted for violating a generally applicable breach-of-the-peace statute.<sup>68</sup> The statute would have applied equally to conduct (fighting), speech that breaches the peace because of its noncommunicative impact (loud speech in the middle of the night), and speech that breaches the peace because of its content (wearing a “Fuck the Draft” jacket). But the Court struck down the application of the law in this last situation, precisely because the law’s application to Cohen was triggered by Cohen’s speech.<sup>69</sup> As the Court later said in *Holder v. Humanitarian Law Project*,<sup>70</sup> when a law “may be described as directed at conduct . . . but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message,” the law is treated as a content-based speech restriction.<sup>71</sup>

Likewise, *Hess v. Indiana*,<sup>72</sup> *Edwards v. South Carolina*,<sup>73</sup> *Terminiello v. City of Chicago*,<sup>74</sup> and *Cantwell v. Connecticut*<sup>75</sup> all set aside breach of the peace and disorderly conduct convictions, though the statutes involved were content-based only as applied, not on their face. As the Court pointed out in *Cantwell*, “breach of the peace” legitimately “embraces a great variety of conduct destroying or menacing public order and tranquility,” including “violent acts.”<sup>76</sup> But the *Cantwell* Court set aside a conviction because the defendant’s speech constituted breach

<sup>68</sup> 403 U.S. 15, 16 n.1 (1971) (involving a statute that, in relevant part, barred people from “maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by tumultuous or offensive conduct” (alteration in original)). The analysis in the next several paragraphs is borrowed from Volokh, *supra* note 30, at 1604–10.

<sup>69</sup> See *Cohen*, 403 U.S. at 25–26.

<sup>70</sup> 561 U.S. 1 (2010).

<sup>71</sup> *Id.* at 27–28 (citing *Cohen*).

<sup>72</sup> 414 U.S. 105, 105 n.1 (1973) (involving a statute that barred people from “act[ing] in a loud, boisterous or disorderly manner so as to disturb the peace and quiet of any neighborhood or family, by loud or unusual noise, or by tumultuous or offensive behavior, threatening, traducing, quarreling, challenging to fight or fighting”).

<sup>73</sup> 372 U.S. 229, 234–37 (1963) (involving a statute that barred “disturbance of the public tranquility, by any act or conduct inciting to violence,” but concluding that speech that disturbs the public tranquility is constitutionally protected even if it is covered by a breach of the peace statute, because “the opinions which [the speakers] were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection”).

<sup>74</sup> 337 U.S. 1, 2 n.1, 3 (1949) (involving a Chicago city ordinance that barred people from “making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace,” where the trial court had defined “breach of the peace” in a jury instruction as “misbehavior which violates the public peace and decorum . . . [or] stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or . . . molests the inhabitants in the enjoyment of peace and quiet by arousing alarm”).

<sup>75</sup> 310 U.S. 296, 308 (1940) (“The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others.”).

<sup>76</sup> *Id.*

of the peace only because of “the effect of [the speaker’s] communication upon his hearers.”<sup>77</sup>

Similarly, the intentional infliction of emotional distress tort is presumptively unconstitutional when applied to speech on matters of public concern, if the speech inflicts emotional distress because of its content.<sup>78</sup> And the same is true when the speech isn’t just distressing but persuades people not to patronize a business, and the business owner sues the speaker for tortious interference with business relations.<sup>79</sup>

Thus, when a law is applied to gruesome speech because of the harms that flow from the gruesome content, the law must be judged in much the same way as expressly content-based statutes or ordinances would be.<sup>80</sup> The law would be unconstitutional as applied unless the speech is viewed as falling into a First Amendment exception, or unless the application of the law passes strict scrutiny.

### 3. *Injunctions*

Several decisions have upheld injunctions against gruesome speech, or stated that some such injunctions would be permitted. In 2013, the Supreme Court declined to hear a case in which a court

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<sup>77</sup> *Id.* at 308–09; *see also* *Feiner v. New York*, 340 U.S. 315, 318 n.1 (1951) (involving a statute that defined “the offense of disorderly conduct” to cover “[using] offensive, disorderly, threatening, abusive or insulting language, conduct or behavior,” “[acting] in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others,” or “[congregating] with others on a public street and refus[ing] to move on when ordered by the police,” “with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned”). The Court upheld the conviction in *Feiner*, but only on the grounds that the speech was unprotected by the First Amendment because it posed a “clear and present danger of . . . immediate threat to public safety.” *Id.* at 320.

<sup>78</sup> *See* *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988). On the other hand, if the speech inflicts emotional distress for content-neutral reasons—such as that it involves residential picketing, which intrudes on residential privacy—strict scrutiny is not applicable. *See, e.g.,* *Tompkins v. Cyr*, 995 F. Supp. 664, 680–81 (N.D. Tex. 1998) (citing *Frisby v. Schultz*, 487 U.S. 474 (1988), which held that the interest in protecting residential privacy was a content-neutral interest).

<sup>79</sup> *See* *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920–23 (1982). Tortious interference with business relations covers a variety of conduct, not just speech. *See, e.g.,* *Lucas v. Monroe Cnty.*, 203 F.3d 964, 968–69, 979 (6th Cir. 2000) (allowing a cause of action based on the discriminatory refusal by a county government to deal with a contractor); *H.J., Inc. v. Int’l Tel. & Tel. Corp.*, 867 F.2d 1531, 1548 (8th Cir. 1989) (holding that selling a product below cost in order to monopolize a market constituted tortious interference); RESTATEMENT (SECOND) OF TORTS §§ 766B cmt. b (citing *Tarleton v. McGawley*, (1793) 170 Eng. Rep. 153 (K.B.), a case imposing liability for physically attacking trading partners, as the ancestor of this tort), 767 cmt. c (offering examples of other conduct that could count as tortious interference).

<sup>80</sup> *See, e.g.,* *Lefemine v. Davis*, 732 F. Supp. 2d 614, 621 (D.S.C. 2010) (treating attempted application of disturbing-the-peace law as content-based when it was justified by the “extremely graphic representations [that] were disturbing motorists”), *aff’d sub nom.* *Lefemine v. Wideman*, 672 F.3d 292 (4th Cir. 2012), *rev’d as to attorney fees*, 133 S. Ct. 9 (2012).

enjoined protesters from displaying “gruesome images” of dead bodies or aborted fetuses where children could see them.<sup>81</sup> (The Colorado Court of Appeals had upheld the injunction, and the Colorado Supreme Court had voted 4-2 to deny review.)<sup>82</sup>

Shortly before, a Wyoming court enjoined protesters from “holding posters/signs or materials of any graphic nature (e.g., aborted fetus pictures)”<sup>83</sup> within two blocks of a national Boy Scouts gathering. The Wyoming Supreme Court held that the injunction was overbroad, but said that there was a “compelling government interest” in “protect[ing] the psychological well being of children,” and that this interest could justify an injunction if there is “evidence concerning the injury or potential injury to children” and “irreparable harm to the children.”<sup>84</sup>

Likewise, in 1986, the Washington Supreme Court upheld an injunction against oral descriptions that were supposedly “trauma[tizing]” to children—for instance, the words “‘kill’, ‘killing’, ‘killer’, ‘murder’, ‘murderer’ and ‘murdering’” used “in indiscriminate connection with physicians and in the presence of young children” outside a medical clinic.<sup>85</sup> In 1990, a California court issued a similar injunction, and some years before, a New York court did, too (though with no limitation to situations where children were present); appellate courts reversed the California and New York injunctions on First Amendment grounds.<sup>86</sup> Another court, in 1999, expressly prohibited protesters outside a clinic from “[g]iving photographs / posters / visual depictions of aborted fetuses to anyone under the age of 16 years old.”<sup>87</sup>

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<sup>81</sup> *Saint John’s Church in the Wilderness v. Scott*, 296 P.3d 273, 281 (Colo. App. 2012), *cert. denied*, 133 S. Ct. 2798 (2013). Of course, it is “well-settled” that “denial of certiorari imparts no implication or inference concerning the Court’s view of the merits.” *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973).

<sup>82</sup> *Scott v. Saint John’s Church in the Wilderness*, No. 12SC658, 2013 WL 119791 (Colo. Jan. 7, 2013).

<sup>83</sup> Order Granting Temporary Restraining Order at 2, *City of Jackson v. Operation Save America*, No. 15781, 2011 WL 4403265 (Wyo. Dist. Ct. May 20, 2011).

<sup>84</sup> *Operation Save America v. City of Jackson*, 275 P.3d 438, 460–61 (Wyo. 2012).

<sup>85</sup> *Bering v. SHARE*, 721 P.2d 918, 933 (Wash. 1986) (internal quotation marks omitted); *see also* *Miss. Women’s Med. Clinic v. McMillan*, 866 F.2d 788, 790, 797 (5th Cir. 1989) (discussing clinic’s request for a similar provision and holding that it was properly denied).

<sup>86</sup> *Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 16 Cal. Rptr. 2d 540, 541–42, 547–48 (Ct. App. 1993), *aff’d as to other provisions*, 873 P.2d 1224 (Cal. 1994) (noting that the backers of the injunction didn’t challenge the invalidation of the order restricting the use of the words), *rev’d and remanded*, 513 U.S. 956 (1994); *O.B.G.Y.N. Ass’n v. Birthright of Brooklyn & Queens, Inc.*, 407 N.Y.S.2d 903, 905–07 (App. Div. 1978).

<sup>87</sup> Preliminary Injunction at 3, *Wilkerson v. Scott*, No. 728883, 1999 WL 34994617 (Cal. Super. Ct. June 11, 1999); *see also* *Trewhella v. City of Lake Geneva*, 249 F. Supp. 2d 1057, 1070 (E.D. Wis. 2003) (noting that the city had sought an injunction “prohibiting [demonstrators] from distributing graphic photographs of aborted fetuses,” but dropped this request before it was resolved).

Such injunctions are likewise content-based, as these courts have acknowledged.<sup>88</sup> Though the injunctions may sometimes be defended as implementing general rules, such as the law of nuisance,<sup>89</sup> gruesome speech triggers those rules precisely because of its content. As Part II.B.2 discussed, this means the restraints are justified with reference to content.

Content-based injunctions might be unconstitutional even when content-based criminal prohibitions and civil liability are permitted. Some Supreme Court opinions, for instance, have suggested that injunctions against labels are unconstitutional.<sup>90</sup> Some state courts have held the same.<sup>91</sup>

But the dominant approach in recent decades has been to treat content-based permanent injunctions much the same as content-based liability.<sup>92</sup> If so, then the First Amendment analysis for the injunctions against gruesome images would be the same as with ordinances or statutes banning such images.

#### 4. *Selective Police Enforcement*

Sometimes, the police stop demonstrators to investigate a supposed violation of some statute or ordinance, or arrest or ticket demonstrators for such a violation, and the demonstrators allege that this happened because of the signs they displayed. For instance, in *Center for Bio-Ethical Reform v. City of Springboro* plaintiffs alleged that the police officers who stopped them—assertedly to investigate possible terrorist activity—told them (referring to plaintiffs' posters of aborted fetuses), "You need to find a different method. . . . Children see those, what about children seeing those, don't you think children shouldn't see those."<sup>93</sup> The court concluded that, if the allegations were true, the police officers' actions violated the First Amendment.<sup>94</sup>

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<sup>88</sup> *Saint John's Church in the Wildness v. Scott*, 296 P.3d 273, 282–83 (Colo. App. 2012); *Operation Save America*, 275 P.3d at 459.

<sup>89</sup> *See Saint John's Church*, 296 P.3d at 275.

<sup>90</sup> *See, e.g., Org. for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971) (citing the doctrine of prior restraint); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 149 (1967) (same).

<sup>91</sup> *See, e.g., Willing v. Mazzocone*, 393 A.2d 1155, 1157 (Pa. 1978); *Kinney v. Barnes*, 443 S.W.3d 87, 93–94 (Tex. 2014).

<sup>92</sup> *See, e.g., Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 389–90 (1973); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 443–44 (1957); *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 349 (Cal. 2007); *Retail Credit Co. v. Russell*, 218 S.E.2d 54, 62–63 (Ga. 1975); *Hill v. Petrotech Res. Corp.*, 325 S.W.3d 302, 305 (Ky. 2010); *St. James Healthcare v. Cole*, 178 P.3d 696, 703 (Mont. 2008); *O'Brien v. Univ. Cmty. Tenants Union, Inc.*, 327 N.E.2d 753, 755 (Ohio 1975). Preliminary injunctions, entered before a trial on the merits that establishes that the speech is unprotected, are generally unconstitutional. *See Mark A. Lemley & Eugene Volokh, Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 169–80 (1998).

<sup>93</sup> 477 F.3d 807, 817 (6th Cir. 2007).

<sup>94</sup> *Id.* at 823.

Likewise, *World Wide Street Preachers Fellowship v. Town of Columbia* concluded that facially neutral laws banning traffic obstruction may have in fact been applied based on the content of the protesters' speech, which included pictures of aborted fetuses.<sup>95</sup> The arresting officer had earlier told the protesters, "We don't mind you all holding up the signs but do you have to hold up those . . . pictures?" "If it's offensive to one person, that makes it wrong," and "It's not the fact that you're out here. It's the fact that your signs are offensive."<sup>96</sup> Such government actions are likewise treated as content-based, and presumptively unconstitutional.<sup>97</sup>

5. *Enforcement of Broadly Unconstitutional Restrictions That Apply to a Wide Range of Speech Beyond Gruesome Speech*

Sometimes broad restrictions enforced against gruesome speech are facially unconstitutional, even when the restrictions do not single out gruesome speech. Thus, for instance, in *Pearson v. City of Stayton* the police threatened a protester with enforcement of ordinances that required a permit for displaying signs.<sup>98</sup> Such a broad discretionary permit requirement is facially unconstitutional.<sup>99</sup> The city therefore agreed to an order enjoining the city from applying the ordinances (1) to "persons . . . displaying signs with images of aborted babies on public ways in the City of Stayton" and, more broadly, (2) to anyone else who wants "to hold signs which convey non-commercial speech."<sup>100</sup> Likewise, sometimes an arrest motivated by the arrestee's

<sup>95</sup> 245 F. App'x 336, 348–49 (5th Cir. 2007).

<sup>96</sup> *Id.* at 339. For other examples of similar selective enforcement against demonstrators displaying gruesome images, see *United States v. Marcavage*, 609 F.3d 264, 280–86 (3d Cir. 2010) (discounting "rangers' testimony that their motivation for removing Marcavage was based exclusively on their concern for public safety and their observation that Marcavage's activities were creating a choke point" and concluding that the rangers' actions were likely actually motivated by Marcavage's speech); *Swagler v. Neighoff*, 398 F. App'x 872, 881 (4th Cir. 2010) (concluding that there needed to be discovery to determine whether the police officers' actions were indeed sincerely motivated by content-neutral traffic safety concerns); *World Wide Street Preachers' Fellowship v. Town of Columbia*, No. 05-0513, 2008 WL 920721, at \*12–13 (W.D. La. Apr. 3, 2008) (likewise concluding that "there remain genuine issues of material fact for trial as to [the police officer's] motivation, particularly in light of his [earlier] statements to the Preachers"); *Grove v. City of York*, 342 F. Supp. 2d 291, 302 (M.D. Pa. 2004) (concluding that, though defendants claimed their reasons were "content neutral," their actions were actually "motivated by the signs' content").

<sup>97</sup> See *Wayte v. United States*, 470 U.S. 598, 608 (1985) (stating that prosecution may not be based on the exercise of a constitutional right); *Fedorov v. United States*, 600 A.2d 370, 382 (D.C. Cir. 1991) (concluding that plaintiffs put forth a prima facie case that their prosecution for unlawful entry was actually based on their speech).

<sup>98</sup> Verified Complaint at 6–8, *Pearson v. City of Stayton*, No. 6:10-cv-06162-HO (D. Or. June 24, 2010).

<sup>99</sup> See, e.g., *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988).

<sup>100</sup> Consent Decree at 2, *Pearson v. City of Stayton*, No. 6:10-cv-06162-HO (D. Or. Aug. 25, 2010); see also *Michael v. City of Granite City*, No. 06-CV-01-WDS, 2006 WL 2539719, at

speech may lack probable cause, which makes it violate the Fourth Amendment quite apart from the possible unconstitutional motivation.<sup>101</sup>

Because such restrictions are, by hypothesis, unconstitutional entirely apart from any reasons related to gruesome images, I won't discuss them further in this Article.

#### 6. *Restrictions on Speech in Nonpublic Fora or Limited Public Fora*

Finally, the government acting as manager of its property (other than traditional public fora such as parks, sidewalks, or streets)—such as a county fair, advertising space on city transit facilities, or a university campus—sometimes restricts gruesome speech on such property.<sup>102</sup> The constitutionality of such restrictions turns on, among other things, whether the location is treated as a designated public forum, a limited public forum, or a nonpublic forum, and on whether the restriction is seen as reasonable in light of the purposes of the forum. Part IV below discusses this in more detail.

### C. The Secondary Effects Doctrine

Starting with the mid-1980s, the Supreme Court has treated some facially content-based restrictions as content-neutral on the theory

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\*5–6 (S.D. Ill. Aug. 31, 2006) (enjoining enforcement of an ordinance, apparently prompted by plaintiffs' anti-abortion speech, barring signs larger than a standard sheet of paper within 25 feet of a parade route); *Michael v. City of Granite City*, 611 F. Supp. 2d 849, 851 (S.D. Ill. 2009) (noting that plaintiffs had displayed "photographs of aborted fetuses").

<sup>101</sup> See, e.g., *Old Paths Baptist Church v. Merry*, No. 4:05-cv-79-SEB-WGH, 2008 WL 244472, at \*8 (S.D. Ind. Jan. 25, 2008) (denying summary judgment on the issue of qualified immunity in a lawsuit alleging such an arrest).

<sup>102</sup> See, e.g., *PETA v. Kan. State Fair Bd.*, 891 F. Supp. 2d 1212, 1226–27 (D. Kan. 2012) (requiring that videos of gruesome images of animals at a fair be shielded from passersby who hadn't decided to enter the booth); *University of Alabama Removes Pro-Life Display Because It Was Deemed 'Offensive'*, CBS ATLANTA (Feb. 12, 2014, 11:14 PM), <http://atlanta.cbslocal.com/2014/02/12/university-of-alabama-removes-pro-life-display-because-it-was-deemed-offensive/>. See also, though as to vulgarities rather than gruesome images, the incident in which a Winona State University pro-gay-rights group wanted to display torsos containing anti-gay epithets and slurs, as a symbol of the hostility gays and lesbians often face. See Letter from Winona State Univ. to Found. for Individual Rights in Educ. (FIRE) (Apr. 23, 2012), available at <http://www.thefire.org/letter-from-winona-state-university-to-fire-april-23-2012/>; Letter from FIRE to Winona State Univ. (Apr. 20, 2012), available at <http://www.thefire.org/fire-letter-to-winona-state-university-april-20-2012/>. The university forbade this, except during particular hours, because school-age children might be on campus and it "would not be appropriate to expose" children to such words. *Id.* at 1.

When the government generally bars all speech in a particular nonpublic forum, see, e.g., *Ctr. for Bio-Ethical Reform, Inc. v. City & Cnty. of Honolulu*, 455 F.3d 910 (9th Cir. 2006) (ban on airplanes towing banners), and the prohibition is valid on its face, then its evenhanded application to gruesome speech would not pose any First Amendment problems.

that they address the “secondary effects” of speech. The only restrictions that the Court has upheld on this rationale have been limits on pornographic theaters and bookstores.<sup>103</sup> But the Court has also discussed this doctrine in nonpornography cases as well.<sup>104</sup>

Restrictions on gruesome speech, however, generally can’t be treated as content-neutral under a “secondary effects” rationale. True, the restrictions are aimed at the effects of the speech—such as emotional disturbance—and not at the speech as such. But “[l]isteners’ reaction to speech is not a content-neutral basis for regulation.”<sup>105</sup> “[T]he emotive impact of speech on its audience is not a “secondary effect” unrelated to the content of the expression itself.”<sup>106</sup> This conclusion remains true when the underlying concern is a risk that offended viewers might react violently to the speech.<sup>107</sup> It also remains true when the concern is about the impact of the speech on children.<sup>108</sup>

And this makes sense. Most speech restrictions of all sorts, including the most plainly content-based ones, are aimed at preventing the intended, likely, or actual effects of speech. For example, bans on advocating illegal conduct are aimed at preventing the conduct being advocated—the intended effect of the speech—and the harms such conduct causes.<sup>109</sup> Bans on speech urging politically-motivated boycotts of businesses are aimed at preventing loss of income to the businesses.<sup>110</sup> Bans on distributing violent video games to children are aimed at preventing violent acts by the children.<sup>111</sup>

Yet all these restrictions are treated as content-based, because the supposed effects flow from the communicative impact of the speech.<sup>112</sup> Whatever restrictions might be rendered content-neutral

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<sup>103</sup> See, e.g., *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 429–30 (2002) (plurality opinion); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–50 (1986).

<sup>104</sup> See, e.g., *Boos v. Barry*, 485 U.S. 312, 320–21 (1988) (plurality opinion).

<sup>105</sup> *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992).

<sup>106</sup> *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (quoting *Boos*, 485 U.S. at 321); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 394 (1992) (expressing the same view).

<sup>107</sup> See *Forsyth Cnty.*, 505 U.S. at 134–35; *Johnson*, 491 U.S. at 407–09; *Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep’t*, 533 F.3d 780, 789 (9th Cir. 2008) (applying this rationale to a demonstration that involved gruesome images of aborted fetuses).

<sup>108</sup> *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 815 (2000); *Reno v. ACLU*, 521 U.S. 844, 867–68 (1997); *Ctr. for Bio-Ethical Reform*, 533 F.3d at 790 (applying this principle to restrictions on gruesome speech).

<sup>109</sup> See *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).

<sup>110</sup> See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 889–93 (1982).

<sup>111</sup> See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2741 (2011).

<sup>112</sup> See, e.g., *id.* at 2734 (treating restriction on violent video games as content-based); *id.* at 2733 (treating restrictions on incitement of crime as being content-based).

on “secondary effects” grounds, restrictions justified by the risk of offending, disturbing, or angering viewers cannot qualify.<sup>113</sup>

There is, however, one possible situation where the secondary effects doctrine can come into play in gruesome speech cases: when a restriction is defended on the grounds that the speech distracts drivers and therefore risks causing accidents. Part III.B will discuss this in more detail.

### III

#### THE REASONS GIVEN FOR RESTRICTING THE SPEECH

Gruesome speech, then, should presumptively enjoy full First Amendment protection. There is no basis for carving out an exception for such speech, neither as a matter of policy nor as a matter of history.<sup>114</sup> And even if the Court is inclined to offer less protection to speech that is seen as “low-value,” Part I shows that there is no basis for treating gruesome images this way.

What then are the reasons usually given for rebutting this presumption? There are generally four: preventing attacks on speakers, preventing traffic accidents, preventing offense to unwilling viewers, and preventing disturbance to children.

#### A. Preventing Attacks on Speakers

##### 1. *The “Fighting Words” Argument*

Gruesome speech restrictions are sometimes defended—and have occasionally been upheld<sup>115</sup>—on the grounds that the speech risks violent reaction from angry listeners, and fits within the “fighting words” exception.<sup>116</sup> This argument, though, is not sound.

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<sup>113</sup> See *United States v. Marcavage*, 609 F.3d 264, 282 (3d Cir. 2010) (applying this principle to restrictions on gruesome speech).

<sup>114</sup> Visual expression has consistently been treated as equivalent to verbal expression under American law (and pre-Revolutionary English law). See Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057 (2009). And there is no historically recognized exception for gruesome speech. See *United States v. Stevens*, 559 U.S. 460, 468–72 (2010) (rejecting an exception for videos of animal cruelty, because there was no historically recognized exception for such speech); *Brown*, 131 S. Ct. at 2734 (likewise as to depictions of violence against humans).

<sup>115</sup> *Orin v. Barclay*, 272 F.3d 1207, 1218 (9th Cir. 2001) (involving speech on a college campus); *Tatton v. City of Cuyahoga Falls*, 116 F. Supp. 2d 928, 931, 934 (N.D. Ohio 2000).

<sup>116</sup> *Rock for Life–UMBC v. Hrabowski*, 411 F. App’x 541, 552 (4th Cir. 2010) (noting public university’s argument that it restricted anti-abortion display partly due to risk of “unprovoked physical attacks”); see also Brief of Appellees, *Orin v. Barclay*, 272 F.3d 1207 (9th Cir. 2001) (No. 00-35177), 2000 WL 33981158, at \*20 (arguing that protestor plaintiff’s incitement of “imminent violent conduct” constituted fighting words); Defendants’ Answer to the Amended Verified Complaint ¶ 26, *Linnemann v. Szczerba*, No. 1:08-cv-00583-GMS (D. Del. Nov. 10, 2008) (admitting that a police officer warned the anti-abortion protester plaintiff that his “sign could incite violence,” though not admitting that this was part of the justification for the officer’s ordering plaintiff to take down the sign).

The government may indeed restrict “fighting words,” “those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.”<sup>117</sup> But fighting words are limited to “direct personal insult[s]” that are “directed to the person of the hearer.”<sup>118</sup> General political messages, however offensive to some people, don’t qualify, as cases such as *Cohen v. California* and *Texas v. Johnson* show.<sup>119</sup>

And outside the narrow zone of direct personal insults, “[s]peech cannot be financially burdened, . . . punished[,] or banned[ ] simply because it might offend a hostile mob.”<sup>120</sup> The government may not enforce a “heckler’s veto” by “silenc[ing] messages simply because they cause discomfort, fear, or even anger.”<sup>121</sup> If the government is worried about the risk of an attack on a speaker, and “extra police protection is [therefore] required to protect an unpopular speaker, [the] municipality must provide that protection.”<sup>122</sup> Even when a speaker’s opinions “attract a crowd and necessitate police protection,” the “compelling answer . . . is that constitutional rights may not be denied simply because of hostility to their assertion or exercise.”<sup>123</sup>

<sup>117</sup> *Cohen v. California*, 403 U.S. 15, 20 (1971).

<sup>118</sup> *Id.* (internal quotation marks omitted); *accord Texas v. Johnson*, 491 U.S. 397, 409 (1989).

<sup>119</sup> *Johnson*, 491 U.S. at 420 (flag burning); *Cohen*, 403 U.S. at 26 (vulgarity); *see World Wide Street Preachers’ Fellowship v. City of Owensboro*, 342 F. Supp. 2d 634, 638–39 (W.D. Ky. 2004) (concluding that the display of aborted fetus photographs was not fighting words, reasoning that the speech “whether one agrees with it or not, was certainly not of ‘slight social value’” and “was not directed at any particular person”); *Liberty Place Retail Assocs. v. Israelite Sch. of Universal Practical Knowledge*, No. 130502028, 2013 WL 7020449, at \*6–7 (Pa. Ct. Com. Pl. Nov. 7, 2013) (concluding that defendants’ speech, which included “graphic pictures of aborted fetuses,” was not fighting words), *aff’d on other grounds*, 2014 WL 5140274 (Pa. 2014); *Commonwealth v. Jarboe*, 12 Pa. D. & C.3d 554, 558–59 (C.P. Cumberland Cnty. 1979) (concluding that display of aborted fetus photographs was not fighting words); *see also State v. Meyer*, 573 N.E.2d 1098, 1099–1100 (Ohio Ct. App. 1988) (concluding that effigy of doctor with bloodied hands and with a sign that said he “kill[s] babies” was not fighting words). *But see Tatton*, 116 F. Supp. 2d at 934 (treating display of “a graphic and disturbing photograph of an aborted fetus in the presence of children” as “fighting words” because it “aroused intense hostility from the parade crowd” and led “one member of the crowd [to] physically confront[ ] Tatton in order to force him to cease protesting”).

<sup>120</sup> *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992).

<sup>121</sup> *Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep’t*, 533 F.3d 780, 788 (9th Cir. 2008) (so holding in a case involving a display of aborted fetuses); *see also Operation Save America v. City of Jackson*, 275 P.3d 438, 460–62 (Wyo. 2012) (applying similar reasoning even in the face of evidence that “a counter-protestor tried to run over [a protester] with his vehicle” and was “arrested and charged” for this behavior).

<sup>122</sup> *Grove v. City of York*, No. 1:05-CV-02205, 2007 WL 465568, at \*11 (M.D. Pa. Jan. 10, 2007) (so holding in a case involving a display of aborted fetuses); *accord World Wide Street Preachers’ Fellowship*, 342 F. Supp. 2d at 639–40 (likewise).

<sup>123</sup> *Cox v. Louisiana*, 379 U.S. 536, 551 (1965) (citations omitted) (internal quotation marks omitted).

## 2. *The Feiner v. New York Argument*

It is possible that, if a speaker *intends* to provoke an imminent attack—perhaps because the speaker thinks he and his friends can win the ensuing fight, or because the speaker thinks the fight will give him some political benefit—and such an attack seems likely, the police may indeed step in to shut down the speech, even if the speech is not “fighting words.” The leading precedent on this is the 1951 *Feiner v. New York* case, in which the speaker had been delivering a speech on race relations, which “gave the impression that he was endeavoring to arouse the Negro people against the whites, urging that they rise up in arms and fight for equal rights.”<sup>124</sup> “Because of the feeling that existed in the crowd both for and against the speaker, the officers finally ‘stepped in to prevent it from resulting in a fight.’”<sup>125</sup> The speaker refused to stop, and he was arrested and prosecuted for disturbing the peace.

The Court acknowledged that, generally speaking, public hostility is not enough to justify restricting a speaker. “We are well aware that the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker, and are also mindful of the possible danger of giving overzealous police officials complete discretion to break up otherwise lawful public meetings.”<sup>126</sup>

Nonetheless, in this case the Court concluded the police action was justified: “[W]hen as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot,” the police may step in.<sup>127</sup> And in *Cohen v. California*—the most recent opinion by the Court citing *Feiner*—the Court appeared to take the view that “incitement to riot” in the sense of *intentionally* provoking a fight was required; the Court characterized *Feiner* as involving “a speaker . . . intentionally provoking a given group to hostile reaction.”<sup>128</sup> *Feiner* has thus been read (both by *Cohen* and by most later lower court cases) as largely assimilating *Feiner* to the *Brandenburg v. Ohio*<sup>129</sup> incitement test: both tests require an intent to produce imminent lawless action, and a likelihood that such an action is produced.<sup>130</sup>

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<sup>124</sup> 340 U.S. 315, 317 (1951).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 320.

<sup>127</sup> *Id.* at 321.

<sup>128</sup> 403 U.S. 15, 20 (1971).

<sup>129</sup> 395 U.S. 444, 447–49 (1969).

<sup>130</sup> See, e.g., *Nelson v. Streeter*, 16 F.3d 145, 150 (7th Cir. 1994) (when “the artist’s intentions are . . . innocent of any desire to cause a riot, but his work so inflames the community as to cause a riot in which people are killed and injured,” “First Amendment rights are not subject to the heckler’s veto,” and officials may not “seek to protect the populace at the expense of the” speaker by suppressing the speaker “rather than the violent rioters”); *Collin v. Smith*, 578 F.2d 1197, 1203 (7th Cir. 1978) (characterizing *Feiner* as standing for the proposition that “intentional ‘incitement to riot’ may be prohibited”);

Moreover, in addition to the purpose requirement, there must be some evidence of probable imminent violence that cannot be deterred by the police presence. A civil rights protest case, *Cox v. Louisiana* illustrates this: Mere “rumblings” and “jeering” from hostile onlookers—even in a group of 100 to 300 hostile people—could not justify ordering demonstrators to disperse, at least absent any express “threat[ of] violence” and given that there were “seventy-five to eighty” police officers on the scene.<sup>131</sup> “[C]onstitutional rights,” the Court reasoned, “may not be denied simply because of hostility to their assertion or exercise.”<sup>132</sup>

A minority of lower court cases (only four that I could find) takes a broader view of the *Feiner* exception. Under this view, a speaker can be restricted when he faces probable imminent violence that cannot be deterred by the police, even if the speaker did not have the purpose of provoking violence.

First, in the 2014 *Bible Believers v. Wayne County* panel decision—which is now being reheard en banc<sup>133</sup>—Christian evangelists were displaying signs saying, among other things, “Jesus is the Way, the Truth and the Life. All Others Are Thieves and Robbers,” “Islam Is A Religion of Blood and Murder,” and “Muhammad is a . . . liar, false prophet, murderer, child molesting pervert,” at an Arab International Festival on city streets.<sup>134</sup> Some onlookers threw objects at the

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Glasson v. City of Louisville, 518 F.2d 899, 905 n.3 (6th Cir. 1975) (“For over twenty years the Supreme Court has confined the rule in *Feiner* to a situation where the speaker in urging his opinion upon an audience intends to incite it to take action that the state has a right to prevent.”); Cong. of Racial Equality v. Douglas, 318 F.2d 95, 101 (5th Cir. 1963) (“The outstanding difference between this . . . case on the one hand and the *Feiner* case on the other is that the element in the latter case of the defendant’s *purpose* and *attempts to incite*, and near success thereto, was totally lacking in this . . . case”); World Wide Street Preachers’ Fellowship v. City of Owensboro, 342 F. Supp. 2d 634, 648 (W.D. Ky. 2004) (distinguishing *Feiner* as requiring “attempt[ ] to incite to riot”); Ware v. City & Cnty. of Denver, 511 P.2d 475, 476 (Colo. 1973) (reading *Feiner* as limited to speakers who are “intentionally provoking a given group to hostile reaction”); State v. Rosenfeld, 303 A.2d 889, 894 (N.J. 1973) (reading *Feiner* as limited to speakers who “persist[ ] with the goal of provoking hostile group reaction”); Lewis v. City of Tulsa, 775 P.2d 821, 823–24 (Okla. Crim. App. 1989) (reading *Feiner* as applicable only when the speaker “passes the bounds of argument or persuasion and undertakes incitement to riot”).

Only one of the cases that takes this view actually held in favor of the government. In that case, *People v. Upshaw*, “within days of the September 11, 2001 terrorist assault,” the defendant displayed signs in New York City stating, “Its [sic] good that the World Trade Center was bombed. More cops and firemen should have died. More bombs should have dropped and more people should have been killed.” 741 N.Y.S.2d 664, 665, 667 (N.Y. Crim. Ct. 2002) (uppercase text changed to lowercase). The court denied the defendant’s request to dismiss the charges of inciting a riot, notwithstanding *Feiner*’s intentional provocation requirement. *Id.* at 667–68, 668 n.4.

<sup>131</sup> 379 U.S. 536, 550 (1965).

<sup>132</sup> *Id.* at 551 (citations omitted) (internal quotation marks omitted).

<sup>133</sup> 765 F.3d 578 (6th Cir. 2014), *reh’g en banc granted* (Oct. 23, 2014).

<sup>134</sup> *Bible Believers v. Wayne Cnty.*, No. 2:12-cv-14236, 2013 WL 2048923, at \*3 (E.D. Mich. May 14, 2013).

speakers, injuring one, and the police eventually ordered the protesters to leave, citing the risk of further injury.<sup>135</sup> The panel majority upheld the removal of the speakers, relying on *Feiner*, and though the majority concluded that the speakers were intending to incite violence, it also suggested that such a purpose wasn't required, and an actual violent reaction would be enough.<sup>136</sup> (The majority didn't deal with the contrary view expressed by *Cohen*.)

Second, in the 1983 case *Sabel v. State*, Revolutionary Communist Party members came to an apartment complex to spread their views (using a bullhorn and apartment-by-apartment canvassing).<sup>137</sup> A group of 150 to 200 hostile residents gathered, and the police, concerned "that the appellants were in danger and that a possible riot was developing which could not be handled by the available officers," ordered the speakers to disperse.<sup>138</sup> The court upheld the speakers' conviction for refusing to disperse, citing *Feiner* but not relying on any finding that the speakers deliberately intended to provoke violence.<sup>139</sup>

A third case, the 2012 *Bell v. Keating* decision, rejected a facial challenge to an ordinance that authorized the police to order groups to disperse when their actions are "likely to cause substantial harm" in the sense of "physical danger or damage to the people and property nearby," even when that harm stems from the reaction of a hostile crowd.<sup>140</sup> And a fourth case, the 1981 *Beckerman v. City of Tupelo*, also seemed to leave open the possibility that, under *Feiner*, speakers could be stopped whenever the police have affirmatively tried "first to disperse and control the crowd" but have found it "impossible."<sup>141</sup>

The better view of *Feiner*, I think, is the one expressed in *Cohen*: that *Feiner* is limited to speech "intentionally provoking a given group to hostile reaction."<sup>142</sup> Allowing the heckler's veto even in the absence of any intent to provoke a crowd would let audience members suppress speech simply by threatening violence, which would both undermine public debate and create an incentive for violent or threatening behavior in the future.<sup>143</sup>

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<sup>135</sup> *Bible Believers*, 765 F.3d at 584–85.

<sup>136</sup> *Id.* at 588–90. Another case, *Commonwealth v. Merrill*, 13 Pa. D. & C.4th 430, 438–39, 444 (C.P. Somerset Cnty. 1991), cited *Feiner* but ultimately relied primarily on a fighting words rationale.

<sup>137</sup> 300 S.E.2d 663, 665 (Ga. 1983), *overruled as to another matter*, *Massey v. Meadows*, 321 S.E.2d 703 (Ga. 1984).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 667.

<sup>140</sup> 697 F.3d 445, 457–58, 461 (7th Cir. 2012).

<sup>141</sup> 664 F.2d 502, 510 (5th Cir. 1981).

<sup>142</sup> *Cohen v. California*, 403 U.S. 15, 20 (1971).

<sup>143</sup> See *Bible Believers v. Wayne Cnty.*, 765 F.3d 578, 594–95 (6th Cir. 2014) (Clay, J., dissenting), *reh'g en banc granted* (Oct. 23, 2014). I have reservations about tests that deny protection to speech based on a finding of a speaker's malign purpose. But at least reading *Feiner* to require a purpose to promote imminent violence is consistent with the well-

Behavior that gets rewarded gets repeated,<sup>144</sup> and when thuggery by those who threaten violence to suppress speech is rewarded by the police stepping in to actually suppress the speech, the result will be more thuggery in the future. “[H]ecklers would be incentivized to get *really* rowdy, because at that point the target of their ire could be silenced.”<sup>145</sup>

Moreover, the heckler’s veto gives hostile law enforcement officials the power to suppress speech even when they could have prevented violence by protecting the speakers. “Police officers could simply sit by as a crowd formed and became agitated. Once the crowd’s agitation became extreme, the police could swoop in and silence the speaker. The First Amendment does not contain this large a loophole.”<sup>146</sup>

The Tenth Circuit’s analysis in *Cannon v. City & County of Denver*—a case involving anti-abortion speech but not gruesome images—strikes me as persuasive here:

The fact that speech arouses some people to anger is simply not enough to amount to fighting words in the constitutional sense. “[A] function of free speech under our system is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.” *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). It is only where “the speaker passes the bounds of argument or persuasion and undertakes incitement to riot” that the police may intervene to prevent a breach of the peace. *Feiner v. New York*, 340 U.S. 315, 321 (1951). . . .

. . . .

We are convinced that here the message on the signs [which labeled the clinic “The Killing Place”] did not amount to fighting words under the Supreme Court’s standards. They were not personally abusive epithets so directed that they were “inherently likely to provoke violent reaction.” They did not approach the incitement to riot involved in *Feiner*. Furthermore they played an important role in the exposition of ideas. We hold therefore that the right of the protestors to picket on the public sidewalk in front of the clinic with the signs was a clearly established constitutional right . . . .<sup>147</sup>

Anti-abortion signs, even ones with messages that people may find highly offensive, are thus not fighting words. And even if such

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established purpose test from *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and is better than just allowing restriction based on the likelihood that audience members will attack the speaker.

<sup>144</sup> Someone said this before I did, but I have no idea who said it first. The earliest print sources that I’ve found repeat it as an already widely accepted maxim.

<sup>145</sup> *Bible Believers*, 765 F.3d at 595 (Clay, J., dissenting).

<sup>146</sup> *Id.*

<sup>147</sup> 998 F.2d 867, 873–74 (10th Cir. 1993) (citations omitted).

signs can be restricted to prevent imminent violent attack, there needs to be something more than just a general fear of such attack, or (in the words of *Cox v. Louisiana*) mere “rumblings” and “jeering.”<sup>148</sup> At the very least, any *Feiner*-based rationale must rest on a showing that (1) the speakers are deliberately inciting violence (rather than just disregarding the risk of violence), and (2) when violence appears imminent, the police try to take steps to prevent the violence without suppressing the speakers, and the police cannot succeed in this despite their best efforts.<sup>149</sup>

## B. Preventing Traffic Accidents

Restrictions on gruesome speech are sometimes defended—and have at least once been upheld<sup>150</sup>—on the grounds that such speech can distract drivers and thus cause traffic accidents.<sup>151</sup> This too is generally an inadequate justification, though the analysis here is more complicated.

The leading Supreme Court case on this subject is *Erznoznik v. City of Jacksonville*, which struck down a ban on the display of nudity on drive-in screens visible from the street.<sup>152</sup> The ban, the Court held, was content-based, and failed strict scrutiny. “[E]ven a traffic regulation,” the Court reasoned, “cannot discriminate on the basis of content unless there are clear reasons for the distinctions,”<sup>153</sup> and “[t]here is no reason to think that a wide variety of other scenes in the customary screen diet, ranging from soap opera to violence, would be any less distracting to the passing motorist” than nudity.<sup>154</sup>

To be sure, it is quite plausible that nudity would be especially distracting. Yet the Court seemed to be forbidding content-based decisions based on such intuitive judgments, and requiring that the supposed distracting quality of the restricted speech be compared to other especially distracting materials (such as violent or emotional scenes) rather than to some neutral, relatively uninvolved material.

<sup>148</sup> 379 U.S. 536, 550–51 (1965).

<sup>149</sup> See *Bible Believers*, 765 F.3d at 596 (Clay, J., dissenting) (“[O]fficers must make an effort to place themselves between the crowd and the speaker, and . . . this duty only falls away once the officers themselves face serious threats of injury. If officers never place themselves in harm’s way—never make any attempt to protect the speaker—it would be difficult to say that they exercised their duties in good faith.”).

<sup>150</sup> *Frye v. Kan. City Mo. Police Dep’t*, 375 F.3d 785, 791–92 (8th Cir. 2004).

<sup>151</sup> See, e.g., *Lefemine v. Davis*, 732 F. Supp. 2d 614, 621 (D.S.C. 2010), *aff’d sub nom. Lefemine v. Wideman*, 672 F.3d 292 (4th Cir. 2012), *rev’d as to attorney fees*, 133 S. Ct. 9 (2012); *State v. Otterstad*, 734 N.W.2d 642, 645–46 (Minn. 2007).

<sup>152</sup> 422 U.S. 205 (1975).

<sup>153</sup> *Id.* at 215.

<sup>154</sup> *Id.* at 214–15. Of course, truly content-neutral restrictions, such as prohibitions on protesting on busy streets, see, e.g., *Cox v. Louisiana*, 379 U.S. 536, 554 (1965), or even bans on protests on particular freeway overpasses that pose a high danger “to distracted motorists,” *Lytle v. Doyle*, 326 F.3d 463, 470–71 (4th Cir. 2003), may well be constitutional.

Some lower court judges have likewise concluded that similar restrictions on gruesome speech are content-based and therefore unconstitutional.<sup>155</sup>

Since *Erznoznik*, the Court has concluded that certain facially content-based restrictions should be treated as content-neutral under the “secondary effects” doctrine, and this might include restrictions aimed at preventing driver distraction. The leading secondary effects case, *City of Renton v. Playtime Theatres, Inc.*, concluded that the tendency of speech (there, pornographic films shown in theaters) to attract people who then do bad things (such as patronize prostitutes) is a content-neutral justification for restricting speech.<sup>156</sup> And the Court held this even though the speech attracted the dangerous people because of its content.<sup>157</sup>

Likewise, one could argue, gruesome speech especially attracts the attention of drivers, which in turn distracts them from the road.<sup>158</sup> Moreover, this distraction might stem not from the hostility to the message, but merely its eye-catching and unusual character.

For instance, the Fourth and Seventh Circuits have seemingly concluded that (1) removing or arresting demonstrators because their “message angered drivers who then reacted and were distracted from the task of driving safely” would be content-based, but that (2) such actions would be content-neutral if the protesters’ “presence on that day and under those driving conditions created a ‘spectacle’ that led some drivers to be distracted from the task of safely navigating” the

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<sup>155</sup> See, e.g., *Lefemine*, 732 F. Supp. 2d at 621 (treating concerns that gruesome anti-abortion signs “were . . . causing traffic issues” as content-based); *Otterstad*, 734 N.W.2d at 648 (Page, J., concurring, writing for three of the seven Justices) (concluding that “it is clear on this record that the state’s prosecution of appellants under the statute was content-based,” even though the prosecution’s theory was based on the supposed distraction to traffic caused by gruesome signs).

<sup>156</sup> 475 U.S. 41, 47–49 (1986).

<sup>157</sup> *Id.*; see also *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (following *Renton* on this score). Likewise, in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), Justice Powell—who wrote the *Erznoznik* majority—argued that “the ordinance in *Erznoznik* was a misconceived attempt directly to regulate content of expression,” partly because the ordinance was “strikingly underinclusive—omitting ‘a wide variety of other scenes in the customary screen diet . . . [that] would be [no] less distracting to the passing motorist.’” *Id.* at 83–84 (Powell, J., concurring in part and concurring in the judgment) (alterations in original) (quoting *Erznoznik*, 422 U.S. at 214–15). This left open the possibility that an ordinance that was focused on speech and that was shown to be unusually distracting would be seen as content-neutral, much as Justice Powell concluded that a zoning ordinance limiting pornographic theaters should be treated as content-neutral because such theaters were shown to be unusually damaging to the neighborhood. See *id.* at 74–76, 84.

<sup>158</sup> See, e.g., *Whitton v. City of Gladstone*, 54 F.3d 1400, 1407 & n.11 (8th Cir. 1995) (accepting the possibility that a facially content-based sign restriction could be seen as aimed at “secondary effects” related to traffic concerns, but concluding that such a rationale didn’t apply in this case because the permitted signs posed “identical [traffic and aesthetic] concerns” that the forbidden ones did (emphasis omitted)).

highway.<sup>159</sup> The Eighth Circuit similarly appeared to treat as content-neutral a police order that protesters not display their signs near a road, because drivers “complained that viewing the photographs impaired their ability to safely drive their vehicles.”<sup>160</sup>

But even under the secondary effects approach, the government must indeed provide sufficient evidence that speech with this particular content actually causes the asserted harms, and does so to an unusual degree: there must be “secondary effects attributable to [the forbidden signs] that distinguish them from the [signs the city] permits to remain on its sidewalks.”<sup>161</sup> That evidence is needed to help show that the restriction is indeed motivated by the supposed attention-attracting secondary effects (rather than by the offensiveness of the message). And the evidence is also needed to show, under intermediate scrutiny, that the restriction is indeed narrowly tailored to serving the traffic safety interest.<sup>162</sup>

<sup>159</sup> *Ovadal v. City of Madison*, 469 F.3d 625, 630 (7th Cir. 2006); *accord Swagler v. Neighoff*, 398 F. App'x 872, 881 (4th Cir. 2010) (quoting *Ovadal* favorably on this score).

<sup>160</sup> *Frye v. Kan. City Mo. Police Dep't*, 375 F.3d 785, 791 (8th Cir. 2004). *But see id.* at 795 (Beam, J., dissenting) (concluding that the police officers' actions were nonetheless content-based because their concerns about “protecting public safety and preventing traffic obstruction . . . arose directly from listeners' reactions” to the content of the signs).

<sup>161</sup> *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430 (1993) (rejecting a “secondary effects” justification for restricting newsracks for commercial advertisements from other newsracks, because “[i]n contrast to the speech at issue in *Renton*, there are no secondary effects attributable to respondent publishers' newsracks that distinguish them from the newsracks Cincinnati permits to remain on its sidewalks”). This is of course also true if the restriction is treated as content-based, rather than as content-neutral under a secondary effects rationale. *See Erznosnik*, 422 U.S. at 215 (“Appellee offers no justification, nor are we aware of any, for distinguishing movies containing nudity from all other movies in a regulation designed to protect traffic.”); *Baker v. Glover*, 776 F. Supp. 1511, 1517 (M.D. Ala. 1991) (rejecting traffic safety justification for ban on vulgarities on bumper stickers, because “defendants have presented no logical or factual support for the proposition that indecent bumper stickers are more likely to distract motorists than other bumper stickers or indeed other objects visible along the state's thoroughfares”); *Cunningham v. State*, 400 S.E.2d 916, 920 (Ga. 1991) (“[I]f the purpose of the statute is traffic regulation, the statute . . . is underinclusive,” because it does not ban non-vulgar bumper stickers that are “at least as distracting as the bumper sticker at issue here”); *Trombetta v. Mayor & Comm'rs of Atlantic City*, 436 A.2d 1349, 1372 (N.J. Super. Ct. Law Div. 1981) (“By singling out places which feature live nude entertainment, the legislative classification is strikingly underinclusive. There is no reason to think that a wide variety of other business uses in the block, featuring sales and other promotional devices, would be any less distracting to the passing motorist.”).

<sup>162</sup> Naturally, the same is true if the restriction is viewed as content-based, and thus subject to strict scrutiny: the government must then likewise show that the forbidden speech indeed causes traffic accidents more than other speech. *See, e.g., Neighborhood Enters. v. City of St. Louis*, 644 F.3d 728, 737–38 (8th Cir. 2011); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1267 (11th Cir. 2005); *Whitton*, 54 F.3d at 1408; *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1569–70 (11th Cir. 1993); *Knoeffler v. Town of Mamakating*, 87 F. Supp. 2d 322, 330–31 (S.D.N.Y. 2000); *Collier v. City of Tacoma*, 854 P.2d 1046, 1055–56 (Wash. 1993). Some of these decisions also concluded that the interest in preventing traffic accidents is not sufficiently compelling to justify content-based restrictions. *See Neighborhood Enters.*, 644 F.3d at 737–38; *Midwest Media Prop., L.L.C. v.*

I know of no evidence that protesters who display aborted fetus images are likely to be materially more distracting than other controversial protesters. Many protests can draw driver attention. Some may use caustic language (e.g., calling employers “rats” or strikebreakers “scabs”). Some may use fanciful and large images (e.g., giant inflatable rat balloons, often used in labor disputes).<sup>163</sup> Some may convey political messages that anger some drivers. And some may simply be intriguing. After all, “the first purpose of *any* sign is to capture the attention of passersby.”<sup>164</sup>

There thus seems to be no genuinely traffic-focused reason to single out aborted fetuses from the others.<sup>165</sup> As the Minnesota Supreme Court rightly concluded, in reversing a conviction for endangering the driving public by displaying gruesome anti-abortion signs,

[T]he state’s highways are awash in signs—some political, some commercial, some informational, all vying for the attention of motorists. The use of road signs by transportation authorities to present drivers with safety, directional, and other information bears witness to the common understanding that not every sign that attracts a driver’s attention creates a danger to the public. Appellants undoubtedly intended for drivers to read their message. In this they were no different from anyone else who posts signs near highways.

Nor does the content of appellants’ signs persuade us that the public was endangered. The state suggested, and the district court agreed, that the graphic picture of the aborted fetus would be particularly distracting, thus endangering the public and violating [the public nuisance statute]. The state cites no evidence to support this conclusion.<sup>166</sup>

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Symmes Twp., 503 F.3d 456, 477–78 (6th Cir. 2007); *Solantic*, 410 F.3d at 1268; *Whitton*, 54 F.3d at 1409; *City of Tipp City v. Dakin*, 929 N.E.2d 484, 500 (Ohio Ct. App. 2010); *Collier*, 854 P.2d at 1056.

<sup>163</sup> See *Tucker v. City of Fairfield*, 398 F.3d 457, 464 (6th Cir. 2005) (rejecting restriction on such a balloon, in the absence of “objective evidence . . . suggesting that the temporary placement of the balloon in the public right-of-way has any adverse effects, such as obstruction of . . . automobile traffic”); *State v. DeAngelo*, 930 A.2d 1236, 1248 (N.J. Super. Ct. App. Div. 2007) (Sabatino, J., concurring in part and dissenting in part) (“It is not readily apparent how the rat balloon involved in this case could have been significantly more harmful to traffic, safety or aesthetics than a large balloon with an eye-catching ad or a commercial logo.”), *rev’d*, 963 A.2d 1200 (N.J. 2009).

<sup>164</sup> *Whitton*, 54 F.3d at 1408 (emphasis added). For this reason, content-neutral limits on placing any sorts of signs on a highway would likely be permissible. See, e.g., *State v. Ovadal*, No. 99-2067-CR, 2000 WL 273019, at \*6 (Wis. Ct. App. Mar. 14, 2000) (upholding such a content-neutral restriction).

<sup>165</sup> There are certainly no studies that I know of aimed at determining whether traffic accidents are especially common around displays of aborted fetuses. Such studies would be hard to conduct: accidents at any particular intersection, fortunately, are rare occasions, and the display of such images is generally sporadic and often unpredictable.

<sup>166</sup> *State v. Otterstad*, 734 N.W.2d 642, 646 (Minn. 2007).

Indeed, I think courts should be skeptical even when some such evidence is introduced, at least in the absence of concrete examples of multiple accidents or near-accidents of a sort that do not regularly occur elsewhere.<sup>167</sup> Even if, for instance, the police hear complaints that a particular sign is supposedly distracting drivers,<sup>168</sup> it's hard to know for sure how accurate such complaints would be. The signs often anger passersby, who may have an incentive to file some neutral-seeming complaints that would get the police to intervene.<sup>169</sup>

Even if the passersby are sincerely worried about distraction of drivers as well as offended by the signs, it's human nature to think the worst of behavior we dislike, and predict various harmful effects that we wouldn't have predicted as to behavior we like. A driver might not think twice about the distracting effect of a political demonstration that he favors, but might sincerely claim that a demonstration that offends him is also physically dangerous, even if both demonstrations are actually identically distracting.

As a police officer defendant stated in one gruesome images case, "in his opinion, had the [plaintiffs'] signs depicted cute puppies, or promoted a business, then the calls [from the public] would never have come in."<sup>170</sup> Public complaints about supposed traffic distraction are thus likely not to be good proxies for actual traffic distraction.

And police evaluation of the dangerousness of particular signs likewise risks such content and viewpoint discrimination. A police officer may sincerely believe that some signs pose a traffic hazard, but

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<sup>167</sup> The Minnesota Supreme Court wrote that, "Such evidence might have included an accident involving motorists who could actually see appellants' signs; testimony from drivers whose ability to control their vehicle was impaired by appellants' signs; or a police officer's observation of traffic disturbances involving drivers distracted by appellants' signs," *id.*, and it stated that, in some situations, a police officer "can and should use his or her experience and expertise to determine whether a sign constitutes a danger to a considerable number of members of the public before that danger manifests itself in injuries," *id.* at 647, presumably then ordering the protesters to take down the sign. *See also* Settlement Agreement at 8, *Linnemann v. Szczerba*, No. 1:08-cv-00583-GMS (D. Del. Nov. 10, 2008) ("If, in fact, it develops that a protest along a busy public highway is causing drivers to slow down, hit their brakes, pull to the side, and nearly run into the back of other vehicles, then there may be sufficient public safety reasons for the police to intervene and ask the protesters to move further back from the road."). For the reasons given in the text, I think courts should be very cautious about accepting such evidence.

<sup>168</sup> *See, e.g., Frye v. Kan. City Mo. Police Dep't*, 375 F.3d 785, 791 (8th Cir. 2004) (noting that drivers "complained that viewing the photographs impaired their ability to safely drive their vehicles").

<sup>169</sup> Consider, for instance, the traffic disruption complaints involved in *Old Paths Baptist Church v. Merry*, No. 4:05-cv-79-SEB-WGH, 2008 WL 244472 (S.D. Ind. Jan. 25, 2008); the court noted that, "[i]n reality, many of the complaints leveled against the . . . protesters . . . related to the content of their message." *Id.* at \*1 n.2. Likewise, in *Swagler v. Sheridan*, 837 F. Supp. 2d 509, 526 (D. Md. 2011), though some motorists called to complain about traffic disturbance, "[e]very single recorded call complaining about the demonstrators . . . primarily relate[d] to the content of the [protesters'] signs."

<sup>170</sup> *Swagler*, 837 F. Supp. 2d at 526.

this belief can easily be influenced—even if only subconsciously—by the officer’s hostility towards the viewpoint that the demonstrators are seeking to express.

Thus, a ban on, say, “signs that tend to distract motorists” is likely to be unconstitutionally vague, for the very reasons mentioned above: the judgment about which images have this effect is too open to deliberate or subconscious viewpoint discrimination.<sup>171</sup> And while a ban on “signs that depict blood” is likely to be relatively clear, it is as unconstitutional as the ban on images of nudity struck down by *Erznoznik*, at least absent any objective evidence that such signs are any more hazardous than other signs.

But even if police officers should be allowed to order protesters to put down their signs or move far from the road when there’s serious evidence that the content of the signs is distracting drivers, at least such serious evidence ought to be required, with regard to this particular demonstration. As the Minnesota Supreme Court noted, all signs have some power to distract.<sup>172</sup> A restriction on allegedly distracting signs can be constitutional only if there is concrete evidence of distraction (such as “a police officer’s observation of traffic disturbances involving drivers distracted by appellants’ signs”).<sup>173</sup>

### C. Preventing Offense

#### 1. Generally

Gruesome images often offend passersby. But the Court has repeatedly held that speech cannot be restricted on the grounds that its content is offensive. Thus, as to public displays of images of nudity, the Court held in *Erznoznik v. City of Jacksonville*,

[W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. . . .

. . . .

. . . [T]he Constitution [generally] does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.<sup>174</sup>

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<sup>171</sup> See *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972) (“A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”).

<sup>172</sup> *Otterstad*, 734 N.W.2d at 646.

<sup>173</sup> *Id.*

<sup>174</sup> 422 U.S. 205, 209–10 (1975).

The Court has held the same as to vulgarities displayed in public places (in *Cohen v. California*),<sup>175</sup> as to flag burning (in *Texas v. Johnson*),<sup>176</sup> and as to other speech.<sup>177</sup>

To be sure, various images may offend in somewhat different ways. Gruesome images tend to offend by disgusting. Flag burning tends to offend by conveying a message of contempt for symbols that many listeners cherish. Vulgarity tends to convey a message of anger and hostility, which may make people feel uneasy. And the very violation of a taboo against the display of images of nudity (even nonsexual nudity) and vulgarity may make viewers feel that the speaker is disrespectful of the social norms that the viewers see as important.

These distinctions, though, ought not make a constitutional difference. In all these situations, including those involving gruesome images, it is the content of what is being said or being depicted that upsets viewers. Gruesome images disgust people precisely because they are recognized as depicting particular things (death, injury, or dismemberment) that many find disturbing.<sup>178</sup> Such an “emotive function which, practically speaking, may often be the more important element of the overall message”<sup>179</sup>—in the words of the *Cohen* Court—is as worthy of protection as the emotive function of the word “fuck.”

## 2. “Captive Audience” Arguments

In *Erznoznik*, the Supreme Court did leave open the possibility that content-based restrictions on potentially offensive speech could be upheld when “the speaker intrudes on the privacy of the home,” or when “the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.”<sup>180</sup> The Court characterized

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<sup>175</sup> 403 U.S. 15, 26 (1971).

<sup>176</sup> 491 U.S. 397, 414 (1989).

<sup>177</sup> See, e.g., *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992); see also *United States v. Marcavage*, 609 F.3d 264, 282–83 (3d Cir. 2010) (holding specifically as to gruesome images).

<sup>178</sup> This distinguishes restrictions on gruesome images from content-neutral restrictions, for instance when large moving pictures are restricted because they distract motorists simply due to their being moving. Indeed, all the courts that have considered the matter have acknowledged that restrictions on “gruesome images” aimed at preventing offense, or at shielding children, are content-based. *Marcavage*, 609 F.3d at 283; *Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep’t*, 533 F.3d 780, 787–90 (9th Cir. 2008); *Saint John’s Church in the Wilderness v. Scott*, 296 P.3d 273, 282 (Colo. App. 2012); *Operation Save America v. City of Jackson*, 275 P.3d 438, 459 (Wyo. 2012).

<sup>179</sup> *Cohen*, 403 U.S. at 26.

<sup>180</sup> *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975). For examples of arguments that people who have to see gruesome signs are a “captive audience,” see Brief of Defendants-Appellees at 38, *Ovadal v. City of Madison*, 469 F.3d 625 (7th Cir. 2006) (No. 05-4723) (arguing that drivers are a “captive audience” to signs hanging from overpasses); Respondents’ Brief at 26, *Brock v. Super. Ct.*, No. 728883 (Cal. Ct. App. June 9, 2000), 2000 WL 34409427 (arguing that drivers and pedestrians entering a clinic are a “captive

both situations as involving “substantial privacy interests . . . being invaded in an essentially intolerable manner.”<sup>181</sup>

But later, in *Carey v. Brown*, the Court struck down a content-based picketing ban even when it was limited to picketing of people’s homes.<sup>182</sup> (A still later case, *Frisby v. Schultz*, upheld a general ban on residential picketing, aimed at protecting “the privacy of the home,” precisely because the ban was content-neutral.)<sup>183</sup> And even *Hill v. Colorado*, which relied on medical patients’ privacy interests as a justification for restricting people from approaching within eight feet of the patients, took pains to argue that the restriction was content-neutral.<sup>184</sup> Captive audience arguments do not suffice to justify content-based restrictions.<sup>185</sup>

To be sure, gruesome images are often seen by unwilling viewers who have no choice but to be confronted by them, without avoiding places where they feel a need to be. People may be on their way to church, to their children’s school, or to the hospital, and have to see images that they find offensive.

But that is the nature of protests. Labor picketing is seen by unwilling viewers who have to go to work, shop at a picketed store, or go to a picketed school. Sometimes the picketing might even be insulting to the viewers, for instance calling strikebreakers “scabs” or “traitors.” The viewers might have to pass by the picket signs and shouted slogans two or more times a day, for weeks on end.

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audience” to signs being carried by protesters); Petition for Writ of Certiorari at 22–24, *Roberts v. Ctr. for Bioethical Reform, Inc.*, No. 08-431 (U.S. Sept. 30, 2008), 2008 WL 4448933 (arguing that schoolchildren going to school are a “captive audience” to signs being carried by protesters).

<sup>181</sup> *Erznoznik*, 422 U.S. at 210 (quoting *Cohen*, 403 U.S. at 21).

<sup>182</sup> 447 U.S. 455, 470–71 (1980).

<sup>183</sup> 487 U.S. 474, 484, 488 (1988) (quoting *Carey*, 447 U.S. at 471) (internal quotation marks omitted).

<sup>184</sup> 530 U.S. 703, 719–20 (2000).

<sup>185</sup> The only case involving a traditional public forum (or speech on private property with the property owner’s permission) in which the Court upheld a content-based restriction citing the “captive audience” concern was *FCC v. Pacifica Foundation*, 438 U.S. 726, 749 n.27 (1978). But this argument was expressly limited to speech that reaches into the home:

Outside the home, the balance between the offensive speaker and the unwilling audience may sometimes tip in favor of the speaker, requiring the offended listener to turn away. As we noted in [*Cohen*]: “While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue . . . , we have at the same time consistently stressed that ‘we are often “captives” outside the sanctuary of the home and subject to objectionable speech.’”

*Id.* (citations omitted). And indeed *Cohen* makes clear that precisely the same speech as that involved in *Pacifica*—vulgarity—cannot be restricted on a “captive audience” rationale in public places.

Public issue picketing of a business or school will likewise often be seen by unwilling employees, patrons, or students. Even drivers may be captive audiences to signs that are in their field of vision, and that they might have to look at for minutes when stuck in traffic or have to see repeatedly on their daily commute.<sup>186</sup>

To be sure, this is relatively brief “captivity,” which people will usually be able to pass by quickly—but so is the “captivity” to protests that show gruesome images. Yet labor protests, protests outside abortion clinics, and other protests are protected, even though they may thrust their messages at unwilling employees, students, clients, or neighbors who have to pass by the protest.<sup>187</sup>

Indeed, this ability of protests to reach people who have not willingly chosen to be exposed to the speech—and some of whom will not want to be exposed to the speech—is seen as a First Amendment merit of street protests, not a First Amendment liability:

It is no accident that public streets and sidewalks have developed as venues for the exchange of ideas. Even today, they remain one of the few places where a speaker can be confident that he is not simply preaching to the choir. With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out. In light of the First Amendment’s purpose “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail,” this aspect of traditional public fora is a virtue, not a vice.<sup>188</sup>

In public places, we will often encounter speech we find offensive, even when it is hard to completely, immediately, and permanently avoid. That is true of vulgarity; even if we turn our eyes away from a vulgar jacket, we will inevitably be exposed to someone else’s vulgarity at some point. It’s true of offensive political messages. It’s true of gruesome images. In none of these cases is the offense to passersby sufficient reason for restricting the speech.

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<sup>186</sup> See Brief of Defendants-Appellees at 38, *Ovadal v. City of Madison*, 469 F.3d 625 (7th Cir. 2006) (No. 05-4723) (arguing that drivers are a “captive audience” to signs hanging from overpasses).

<sup>187</sup> See, e.g., *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 94 (1972) (upholding right to picket outside schools).

<sup>188</sup> *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (citation omitted). This came from the five-Justice majority opinion, but the four-Justice concurrence was even more critical of the restriction on the speech in that case (a limit on demonstrating outside abortion clinics). See *id.* at 2543–46 (Scalia, J., concurring).

3. *Offensive Speech Undermining People's Experiences at the Place Being Protested*

Offensive speech, like other speech, can have a lingering effect on the viewer's mood, even if the viewer is only physically exposed to the speech for a short time. Someone who sees gruesome images of slaughtered animals outside a restaurant may find it harder to enjoy his steak. Worshippers who pass a gruesome anti-abortion display outside their church may find it harder to engage in quiet contemplation within the worship services. Employees working at a drug company who are confronted with gruesome images of animal experiments might be angry and distracted and thus less productive at work.

But this can't suffice to allow content-based restrictions on offensive speech generally, or gruesome speech in particular. Protests outside a place that is being protested routinely make people feel bad about their visit to the place—indeed, that is often the intention. Union picket lines are often aimed at making strikebreaking union members feel guilty about going to work, and to make customers feel guilty about shopping at the store. The “store watchers” in *NAACP v. Claiborne Hardware Co.*, who took down names of black customers of white-owned stores, were trying to make the customers fear social ostracism,<sup>189</sup> something that would surely affect the customers' shopping experience.

Nor should there be a special rule for speech around churches (the location of some gruesome image protests).<sup>190</sup> Religious institutions, like other institutions that play an important role in spreading ideas, are often fitting targets for criticism.

Some people may believe that certain churches are not properly speaking out against evil—a failure that is especially harmful precisely because the church characterizes itself as a force for good in society. Some may believe that certain churches are harming society (or the world or the environment) by preaching against contraceptives or abortion or homosexuality.<sup>191</sup> Some may believe that certain churches are morally responsible for crimes committed by their

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<sup>189</sup> 458 U.S. 886, 925 (1982).

<sup>190</sup> See, e.g., *Olmer v. City of Lincoln*, 192 F.3d 1176, 1178 (8th Cir. 1999); *Saint John's Church in the Wilderness v. Scott*, 296 P.3d 273, 275 (Colo. App. 2012).

<sup>191</sup> See, e.g., *Act Up – Fight Back – Fight Aids*, ACT UP (AIDS COALITION TO UNLEASH POWER) <http://www.actupny.org/YELL/stopchurch99.html> (last visited Mar. 12, 2015) (“In December of 1989, ACT UP made history with a massive protest at St. Patrick's Cathedral. Five thousand people protested the Roman Catholic Archdiocese's public stand against AIDS education and condom distribution, and its opposition to a wom[a]n's right to abortion.”).

ministers.<sup>192</sup> Some may believe that certain churches are teaching dangerous theological doctrines. Nailing ninety-five theses to a church door might today be a trespass, but displaying signs containing those theses on a nearby sidewalk has to be constitutionally protected.<sup>193</sup>

Perhaps because of this, the Court has never allowed any special restrictions on speech outside churches. Churches, to be sure, are places for constitutionally protected First Amendment activity. But so are political rallies, movie theaters, bookstores, or the headquarters of the NRA and the ACLU, yet protesters are free to express their disapproval of such events and places. Churches, bookstores, and advocacy groups are all equally protected from governmental suppression of their speech or worship. Yet those who want to protest outside churches, bookstores, and advocacy groups are all equally protected by the First Amendment as well.<sup>194</sup>

I know of one case that expressly strikes down a content-based speech restriction around churches,<sup>195</sup> no cases that authorize content-based speech restrictions around churches, and only one case that authorizes content-neutral restrictions (setting aside for now the special context of churches where funeral rites are being conducted at the time). That one case is *St. David's Episcopal Church v. Westboro Baptist Church, Inc.*,<sup>196</sup> which upheld an injunction against picketing by the infamous "God Hates Fags" Westboro Baptist Church; and the reasoning of the case is not persuasive.

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<sup>192</sup> See, e.g., Mauricio Marin, *SNAP Protests Against Convicted Church Music Director*, TUCSON NEWS NOW (Nov. 10, 2013, 6:27 PM), <http://www.tucsonnewsnow.com/story/23929620/snap-protests-against-convicted-church-music-director>.

<sup>193</sup> At the time of Martin Luther, the Castle Church door in Württemberg apparently served as a sort of community bulletin board for the university. CHARLES BEARD, *MARTIN LUTHER AND THE REFORMATION IN GERMANY UNTIL THE CLOSE OF THE DIET OF WORMS* 213 (J. Frederick Smith ed., 1896). Note that there is controversy as to whether Luther actually nailed the theses to the door, or instead simply sent them to church officials. ERWIN ISELOH, *THE THESES WERE NOT POSTED: LUTHER BETWEEN REFORM AND REFORMATION* (Jared Wicks trans., 1968) (1966).

<sup>194</sup> Indeed, providing special protection from criticism to places where people engage in religious expression would likely violate the Establishment Clause, just as providing special exemptions from taxes to religious publications has been held to violate the Establishment Clause. See *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 16–17 (1989); *id.* at 26 (Blackmun, J., concurring in the judgment); *id.* at 25–26 (White, J., concurring in the judgment on freedom of expression grounds). Just as the government may not give special financial benefits to "writings promulgating the teaching of the faith," *id.* at 14, so the government may not set up special criticism-free zones outside events that promulgate the teaching of the faith.

<sup>195</sup> *Survivors Network of Those Abused by Priests, Inc. v. Joyce*, No. 13-3036, 2015 WL 1003121, at \*8–9 (8th Cir. Mar. 9, 2015) (striking down statute that banned, among other things, "[i]ntentionally and unreasonably disturb[ing] . . . any house of worship by using profane discourse, rude or indecent behavior . . . so near [the house of worship] as to disturb the order and solemnity of the worship services").

<sup>196</sup> 921 P.2d 821 (Kan. Ct. App. 1996).

To begin with, the court heavily relied on *FCC v. Pacifica Foundation* as justification for restricting offensive speech that can be seen by children,<sup>197</sup> even though the speech was in a traditional public forum (a public sidewalk) rather than on the less-protected medium of broadcasting. *Pacifica* itself expressly limited its holding to broadcasting,<sup>198</sup> which was necessary given that the very restriction at issue in *Pacifica*—a ban on vulgarities—had been struck down as to non-broadcasting speech in *Cohen v. California*.<sup>199</sup> When it comes to attempts to ban offensive speech in public fora, *Cohen* is the relevant precedent, not *Pacifica*.

The *St. David's Episcopal Church* court also relied on *Madsen v. Women's Health Center, Inc.* for the proposition that targeted picketing restrictions were constitutional.<sup>200</sup> But *Madsen* upheld a thirty-six foot buffer zone around a clinic entrance only because many prior attempts to prevent blocking of clinic entrances were unsuccessful.<sup>201</sup> And the 2014 *McCullen v. Coakley* decision reaffirmed that, in the absence of such a track record of “failed attempts to combat” entrance blocking, a thirty-five foot buffer zone around clinic entrances was unconstitutional.<sup>202</sup>

Likewise, content-based restrictions on gruesome speech outside medical facilities cannot be justified based on the special status of those facilities.<sup>203</sup> Even a facially content-neutral ban on “images observable” by clinic patients, “intended to reduce the level of anxiety and hypertension suffered by the patients inside the clinic,” is unconstitutional, the Court in *Madsen* held.<sup>204</sup> “[I]f the patient found . . . expression contained in such images disagreeable,” the Court concluded, the patient should just have “the clinic . . . pull its curtains.”<sup>205</sup> Yet such a remedy would obviously not shield patients walking into the clinic, so the Court was implicitly concluding that the risk of anxiety for such entering patients could not justify even a content-neutral speech restriction. And the holding of *McCullen v. Coakley* shows that

<sup>197</sup> See *id.* at 831 (citing 438 U.S. 726 (1978)).

<sup>198</sup> 438 U.S. at 748 (“[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection.”).

<sup>199</sup> 403 U.S. 15, 26 (1971).

<sup>200</sup> See 921 P.2d at 829–30 (citing 512 U.S. 753 (1994)).

<sup>201</sup> 512 U.S. at 769–70. The government interest that the Court cited to support the 36-foot buffer zone was “protecting unfettered ingress to and egress from the clinic, and ensuring that petitioners do not block traffic.” *Id.* at 769.

<sup>202</sup> 134 S. Ct. 2518, 2539 (2014).

<sup>203</sup> See, e.g., *Bering v. SHARE*, 721 P.2d 918, 937 (Wash. 1986) (“A child who arrives in his doctor’s office upset and fearful of his doctor cannot be expected to respond in a manner which maximizes the doctor’s ability to provide needed health care. Where an adult is concerned, such consequences arguably constitute the price we pay for free speech. Where a child is concerned, however, the cost is unacceptable.”).

<sup>204</sup> 512 U.S. at 773.

<sup>205</sup> *Id.*

speech around abortion clinics, even within thirty-five feet of the entrances, is constitutionally protected.<sup>206</sup>

To be sure, the Court has upheld content-neutral restrictions on picketing outside people's homes, precisely because such picketing is seen as interfering with the emotional experience of people in the homes.<sup>207</sup> And two circuit courts have upheld content-neutral restrictions on targeted picketing outside a funeral<sup>208</sup>—a place where people are dealing with extraordinary grief.

But the Court has made clear that content-based restrictions on residential picketing are unconstitutional;<sup>209</sup> restrictions on gruesome speech, for the reasons given in Part II.A, are content-based. And in any event, *McCullen* and the other public demonstration cases make clear that the home, and perhaps the place where a funeral is held, are the exceptions in which focused protests may be barred—the rule is that such protests are generally protected. That rule applies even when the viewers may be emotionally vulnerable and potentially disquieted by the offensiveness of the speech (for instance, when they are going to an abortion clinic). It even more clearly applies in other places, whether near churches, schools, or other locations.

#### D. Preventing Harm to Children

The appellate courts that have upheld “gruesome images” restrictions have focused not on offense, but on supposed harm to children.<sup>210</sup> Even some courts that have held such restrictions unconstitutional have left open the possibility that more narrowly crafted restrictions could indeed be justified on these grounds.<sup>211</sup>

The Supreme Court, the argument goes, has held that there is a compelling government interest in preventing psychological harm to children.<sup>212</sup> Restrictions on the distribution of sexually themed speech to minors, as well as the display of sexually themed speech where minors are present, have been upheld under the Court's

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<sup>206</sup> 134 S. Ct. at 2525, 2541.

<sup>207</sup> *Frisby v. Schultz*, 487 U.S. 474, 487–88 (1988).

<sup>208</sup> *Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678, 692–93 (8th Cir. 2012) (en banc); *Phelps-Roper v. Strickland*, 539 F.3d 356, 362–66 (6th Cir. 2008).

<sup>209</sup> *Carey v. Brown*, 447 U.S. 455, 470–71 (1980).

<sup>210</sup> See *Saint John's Church in the Wilderness v. Scott*, 296 P.3d 273, 281 (Colo. Ct. App. 2012), cert. denied, 133 S. Ct. 2798 (2013); *Bering v. SHARE*, 721 P.2d 918, 933–35 (Wash. 1986); see also Preliminary Injunction at 3, *Wilkerson v. Scott*, No. 728883, 1999 WL 34994617 (Cal. Super. Ct. June 11, 1999) (enjoining protestors from distributing gruesome images to minors under the age of 16).

<sup>211</sup> See *Frye v. Kan. City Mo. Police Dep't*, 375 F.3d 785, 791 n.2 (8th Cir. 2004); *Olmer v. City of Lincoln*, 192 F.3d 1176, 1180 (8th Cir. 1999), overruled in part as to a different matter by *Phelps-Roper*, 697 F.3d at 692; *Operation Save America v. City of Jackson*, 275 P.3d 438, 460–61 (Wyo. 2012).

<sup>212</sup> *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

“obscene-for-minors” doctrine.<sup>213</sup> Therefore, the courts conclude, children can be shielded from disturbing gruesome images as well.

But the Court has repeatedly held that, setting aside sexually themed materials, speech cannot be restricted based on the interest in shielding minors from a particular kind of content. Thus, in *Erznoznik v. City of Jacksonville*, the Court struck down a ban on the display of images of nudity on drive-in movie theater screens that were visible from public streets.<sup>214</sup> Such displays, the Court held, are constitutionally protected even though minors might see them:

[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them. . . .

. . . Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors.<sup>215</sup>

Likewise, in *Brown v. Entertainment Merchants Association*, the violent video games case, the Court struck down a ban on distributing violent video games to minors, even though such a ban would not have interfered with speech to adults.<sup>216</sup> And both in *Erznoznik* and in *Brown*, the Court made clear that the obscene-for-minors exception ought not be extended beyond sexually themed speech.<sup>217</sup>

*FCC v. Pacifica Foundation* did uphold a restriction on vulgar words on broadcast radio and television, partly justified by the desire to shield children from such material.<sup>218</sup> But *Pacifica* expressly stressed that it was applying a special rule for the FCC-regulated airwaves;<sup>219</sup> indeed, the very restriction that it upheld would have been unconstitutional in a public place, given *Cohen v. California*.<sup>220</sup> Thus, *Cohen*, not *Pacifica*, is the more apt precedent as to shielding children from speech on public streets and sidewalks.

<sup>213</sup> Ginsberg v. New York, 390 U.S. 629, 640–43 (1968); see also Crawford v. Lungren, 96 F.3d 380, 387–89 (9th Cir. 1996) (upholding ban on unattended coin-operated newsrack sales of “harmful to minors” material); Am. Booksellers v. Webb, 919 F.2d 1493, 1512–13 (11th Cir. 1990) (upholding ban on display, in a place accessible to minors, of any material that’s “harmful to minors”); Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520, 525–29 (Tenn. 1993) (same).

<sup>214</sup> 422 U.S. 205, 213–14 (1975).

<sup>215</sup> *Id.* at 212–13 (footnote omitted) (citations omitted).

<sup>216</sup> 131 S. Ct. 2729, 2741–42 (2011).

<sup>217</sup> *Id.* at 2744; *Erznoznik*, 422 U.S. at 212–14.

<sup>218</sup> 438 U.S. 726, 750 (1978) (plurality opinion); *id.* at 757 (Powell, J., concurring).

<sup>219</sup> *Id.* at 748–50.

<sup>220</sup> 403 U.S. 15 (1971); see *supra* note 185.

Indeed, since *Pacifica*, the Court has repeatedly resisted attempts to expand *Pacifica* beyond broadcasting (for instance, to the Internet).<sup>221</sup> Justices Ginsburg and Thomas have suggested that *Pacifica* should be reversed altogether.<sup>222</sup> But in any event, *Pacifica* doesn't apply to speech outside broadcasting, and especially in public fora.

And *Erznoznik* and *Brown* were right not to apply the obscene-for-minors precedents to other kinds of speech. The obscenity and obscenity-as-to-minors doctrines are in considerable tension with many aspects of First Amendment law. They are unusually vague. They call for courts to make ad hoc decisions about what counts as "serious literary, artistic, political, or scientific value," something the Court has rejected outside the obscenity context.<sup>223</sup>

They carve out a subject matter of speech as being less constitutionally protected, despite the Court's general rejection of subject matter classifications.<sup>224</sup> They allow the punishment of speech with little evidence of imminent risk of violence (as is required for the incitement or fighting words exceptions)<sup>225</sup> or of substantial harm to particular people (as is required for the threats and libel exceptions).<sup>226</sup>

The doctrines have largely been justified on two grounds. The first, and likely most significant, is tradition. *Roth v. United States*, the first Supreme Court case to squarely recognize an obscenity exception, expressly rested on the "history" of obscenity regulation in America, dating from the Framing to the time that *Roth* was decided.<sup>227</sup> Later cases have repeated this justification.<sup>228</sup>

It is understandable that the Court would be reluctant to entirely overturn laws that had such a long tradition behind them. Our legal system is built on tradition and precedent, and even in First Amendment law, tradition has long mattered. Indeed, in recent years the

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<sup>221</sup> See, e.g., *Reno v. ACLU*, 521 U.S. 844, 867 (1997).

<sup>222</sup> *FCC v. Fox Television Stations, Inc. (II)*, 132 S. Ct. 2307, 2321 (2012) (Ginsburg, J., concurring); *FCC v. Fox Television Stations, Inc. (I)*, 556 U.S. 502, 532–35 (2009) (Thomas, J., concurring).

<sup>223</sup> See *United States v. Stevens*, 559 U.S. 460, 479 (2010).

<sup>224</sup> See, e.g., *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229–31 (1987); *Carey v. Brown*, 447 U.S. 455, 460–61 (1980).

<sup>225</sup> See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

<sup>226</sup> See *United States v. Alvarez*, 132 S. Ct. 2537, 2544–45 (2012) (plurality opinion); *id.* at 2553–54 (Breyer, J., concurring in the judgment); *Virginia v. Black*, 538 U.S. 343, 359–60 (2003).

<sup>227</sup> 354 U.S. 476, 482–83, 485 (1957).

<sup>228</sup> See, e.g., *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2734–35 (2011) (rejecting extension of obscenity tests to non-sexually-themed speech on the grounds that it goes beyond the historically recognized scope of the obscenity exception); *Miller v. California*, 413 U.S. 15, 20 (1973) (relying on the *Roth* historical argument).

Court has become even more focused on tradition as the justification for First Amendment exceptions.<sup>229</sup>

But even if history can adequately justify traditionally recognized exceptions to the freedom of speech, the Court in *Brown* was right to reject extending the obscenity logic to speech that has *not* been traditionally unprotected.<sup>230</sup> The history of the obscenity exception shouldn't be given gravitational force beyond its traditional boundaries.

The second rationale is that sexually explicit speech is, as a category, particularly unlikely to have a strong connection to important public debates. *Roth* rested on the theory that obscenity is “utterly without redeeming social importance.”<sup>231</sup> *Miller*, though it loosened that standard in some measure, still argued that “commercial exploitation of obscene material” was far removed from “the free and robust exchange of ideas and political debate.”<sup>232</sup> And indeed the great bulk of sexually explicit material is distributed not to make a political point, but to sexually arouse.

Perhaps this reasoning shouldn't, as a matter of first principles, strip such material of constitutional protection. Nonetheless, the reasoning helps explain why the Court thought that obscenity law would overwhelmingly affect material that is unrelated to political debate. And the survival of the obscenity exception since 1973 is closely related, I think, to the fact that in practice it has indeed been cabined to exclude speech that has any real connection to public issues.

Neither of these two rationales applies to “gruesome images.” When it comes to such images, there is nothing like the long, broad, and deep history that has been used to justify obscenity law. Public display of gruesome images is especially likely to be aimed precisely at debate on political, religious, or moral matters—partly because there is relatively little other reason to display material that, unlike pornography, is so unarousing. And, as Part I argued, such speech is likely to be valuable to this sort of debate.

Indeed, gruesome images are valuable not just to adult viewers, but to minors as well. That is especially true with regard to abortion. Many American girls get pregnant, and participate in making decisions about abortion, even in their early teens.<sup>233</sup> The boys who

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<sup>229</sup> See, e.g., *Alvarez*, 132 S. Ct. at 2547; *Brown*, 131 S. Ct. at 2734; *United States v. Stevens*, 559 U.S. 460, 469–70 (2010).

<sup>230</sup> 131 S. Ct. at 2734–35.

<sup>231</sup> 354 U.S. at 484.

<sup>232</sup> 413 U.S. at 34.

<sup>233</sup> In 2006, for instance, over 6,000 abortions were performed on girls age 14 or younger in the United States. GUTTMACHER INST., U.S. TEENAGE PREGNANCIES, BIRTHS AND ABORTIONS 10, tbl.2.4 (2010), <http://www.guttmacher.org/pubs/USTPTrends.pdf>. Assuming the great majority of these involved fourteen-year-old girls rather than younger ones,

impregnate the girls may play a role in making these decisions, too.<sup>234</sup> And some of these girls and boys may be making decisions about whether to have sex—or whether to have genital sex, or which form of contraception to use—based partly on the ready availability of abortion.

These decisions about abortion and sex, which can influence the entire path of the girls' and boys' future lives, are themselves inevitably influenced by what those children have learned in the years before that decision. As Judge Posner has noted, children below voting age “must be allowed the freedom to form their political views on the basis of uncensored speech *before* they turn eighteen, so that their minds are not a blank when they first exercise the franchise.”<sup>235</sup> Likewise, children must be allowed the freedom to form their moral, religious, and political views about abortion on the basis of uncensored speech before they reach the age when they have to decide whether to have an abortion.

One gruesome speech case, *Bering v. SHARE*, dismissed this argument (as to an injunction barring speech where under-twelve-year-olds are present) on the ground that “[a]lthough use of such language”—reference to abortion providers as “killers” or “murderers”—“arguably furthers the national debate on abortion when directed at adults, the same cannot be said when such language is directed at young children.”<sup>236</sup>

A child's understanding of the abortion issue is not furthered by non-educational epithets of the type proscribed by the injunction. Furthermore, children have very limited access to the political process and cannot be expected to further the aims of SHARE and other anti-abortion groups. Finally, few children of this age can reasonably be expected to visit the Medical Building for abortion-related services, and therefore cannot be viewed as requiring any anti-abortion counseling, especially of the type proscribed.<sup>237</sup>

But this is mistaken, I think, for three reasons. First, referring to abortion providers as “murderers” may be “noneducational” in the

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this means that about 0.25% of fourteen-year-old girls had an abortion that year. And a fourteen-year-old girl recently went to court to restrain her family from forcing her to get an abortion. *Texas Suit over Forced Abortion Threat Resolved, Attorney Says*, CNN (Jan. 18, 2012, 5:52 PM), <http://www.cnn.com/2012/01/18/us/texas-pregnant-teen/>.

<sup>234</sup> While the ultimate decision is legally the girl's (and perhaps her parents'), the girl may still be romantically involved with the boy, and thus care about the boy's wishes. And the girl's decision to get an abortion may often be heavily influenced by her view that the boy is unwilling to help support the child. Persuading the boy that abortion is wrong may lead him to be more willing to commit to doing what is needed to make the girl feel that the abortion is unnecessary.

<sup>235</sup> *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001).

<sup>236</sup> 721 P.2d 918, 923, 937 (Wash. 1986).

<sup>237</sup> *Id.* at 937 n.8.

sense that it's not a detailed logical argument—but it is certainly a political claim that even under-twelve-year-olds can consider, just as they can consider claims that, for instance, “meat is murder.”

Second, as discussed above, the eleven-year-olds of today are the fourteen-year-olds of a few years hence, and the eighteen-year-olds of a few years after that. As fourteen-year-olds, or even younger, they may participate in decisions about sex or even abortion. As eighteen-year-olds, they may make decisions about how to vote. As teenagers, they may try to persuade other teenagers, or even their parents or other adults, about how to vote.<sup>238</sup>

Third, and most important, restrictions on what can be said when under-twelve-year-olds are present also interfere with speech to adults and to teenagers. “[R]egardless of the strength of the government’s interest’ in protecting children, ‘[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.’”<sup>239</sup> And the same should be true of discourse on a public street, which is often “one of the few places where a speaker can be confident that he is not simply preaching to the choir.”<sup>240</sup>

Of course, in principle, even if courts rightly reject the pornography analogy, supporters of restrictions on gruesome speech can still argue that the restrictions pass strict scrutiny—are narrowly tailored to a compelling government interest from shielding children from psychological harm.<sup>241</sup> Indeed, if there were real evidence that brief, occasional exposure to gruesome material caused not just upset to children, but lasting and substantial psychological harm, then courts would face a difficult question.

But no such evidence was offered in any of the cases in which this harm to children argument was made. Instead, at most the cases in-

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<sup>238</sup> Unsurprisingly, people on both sides of the abortion debate try to teach their children their views on the subject, and even get the children involved in public advocacy on the matter. See, e.g., Randi Weiner, *Students Celebrate Rose Mass*, J. NEWS (Westchester Cnty., N.Y.), Jan. 23, 2008, at 6A (“Seven eighth-graders from Catholic school, each carrying a rose, walked solemnly up the aisle at St. Paul’s Church yesterday to the sound of ‘Blest Are They’ sung by an elementary school choir. Placing the roses—white and red—on the church’s altar has become a tradition for Rockland’s Catholic school students during the annual Rose Mass, a piece . . . of the national movement to reverse *Roe v. Wade* . . .”); *Planned Parenthood Brings Representatives from Around Nation, World to March for Womens’ Lives*, FREE REPUBLIC, Apr. 25, 2004, <http://www.freerepublic.com/focus/news/1124203/posts> (“Today hundreds of thousands of women, men, children and teens will gather from across the country and around the world to protest attacks on women’s reproductive rights and speak up for America’s pro-choice majority.”).

<sup>239</sup> *Reno v. ACLU*, 521 U.S. 844, 875 (1997) (alterations in original) (quoting *Bolger v. Youngs Drug Prods.*, 463 U.S. 60, 74–75 (1983)).

<sup>240</sup> *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014).

<sup>241</sup> See *Frye v. Kan. City Mo. Police Dep’t*, 375 F.3d 785, 791 (8th Cir. 2004) (discussing such an argument); *Saint John’s Church in the Wilderness v. Scott*, 296 P.3d 273, 283–84 (Colo. App. 2012) (same); *Bering*, 721 P.2d at 937 (same); *Operation Save America v. City of Jackson*, 275 P.3d 438, 461 (Wyo. 2012) (same).

cluded evidence that some children were upset, or that some parents thought their children would be upset. Thus, for instance, *Scott v. Saint John's Church in the Wilderness* upheld a ban on the display of “gruesome images” of aborted fetuses outside a church, reasoning that the display “caused or could cause psychological harm” to children; the only evidence supporting this was:

- “Parents were concerned about the effect the posters had upon their children.”
- “The posters’ gruesome images were highly disturbing to children in the congregation apart from any message they intended to convey.”
- “The priest’s seven-year-old daughter buried her face in her hymnal as she passed defendants’ posters and remained upset about the images several days later.”<sup>242</sup>

The trial court hadn’t found that such disturbance rose to the level of actual or likely psychological harm, and no expert evidence on the subject was introduced. “[C]aused or could cause psychological harm” was the Court of Appeals’ characterization.<sup>243</sup>

One can sympathize with parents’ desire to shield their children from speech that the children might find disturbing. But if the government can use the force of law to suppress any speech that a court may find concerns parents, that is in the court’s view “highly disturbing to children,” and that leads at least one child to avert her eyes and be “upset,” then the government would have broad power over a vast range of public speech.

The Ninth Circuit’s response to the child protection rationale, I think, is the sound one:

We are mindful that this case involves a special circumstance, the presence of children. In particular, the evidence suggests that children were distracted by the Plaintiffs’ pictures, and this distraction perhaps posed a danger as students crossed the streets around the school. Children may well be particularly susceptible to distraction or emotion in the face of controversial speech, and may not always be expected to react responsibly. These considerations, among others, might conceivably support the proposition that the heckler’s veto principle is less sweeping where the targeted audience is children.

There is, however, no precedent for a “minors” exception to the prohibition on banning speech because of listeners’ reaction to its content. It would therefore be an unprecedented departure from bedrock First Amendment principles to allow the government

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<sup>242</sup> *Saint John's Church*, 296 P.3d at 284.

<sup>243</sup> *Id.*

to restrict speech based on listener reaction simply because the listeners are children.<sup>244</sup>

#### IV

#### GRUESOME SPEECH IN NONPUBLIC FORA OR LIMITED PUBLIC FORA

##### A. Non-Traditional-Public-Forum Property Generally

So far we have considered speech on streets, on sidewalks, and in parks. Though these places are government property, the government's role as property owner gives it no extra authority to restrict speech in such "traditional public fora."

In other places, though, the government as property owner does have extra authority. This is especially so for property where the government is trying to run a utilitarian commercial venture, in which customer convenience and enjoyment are important.

Thus, places that the government has not deliberately opened for speech, such as airports, are treated as "nonpublic fora."<sup>245</sup> Places that the government has opened for speech but only by particular kinds of speakers or on particular subjects (such as county fairs) are treated as "limited public fora."<sup>246</sup> And in either place, speech restrictions are allowed if they are (1) reasonable in light of the purposes of the forum and (2) viewpoint-neutral.<sup>247</sup>

If the real reason for a restriction on gruesome images is disapproval of the political viewpoint that the images are usually used to express,<sup>248</sup> then the restriction would be

<sup>244</sup> *Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't*, 533 F.3d 780, 790 (9th Cir. 2008) (footnote omitted).

<sup>245</sup> *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992).

<sup>246</sup> *See Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981).

<sup>247</sup> *See, e.g., Long Beach Cmty. Coll. Dist. v. Superior Court of L.A. Cnty.*, No. B190647, 2006 WL 3072413, at \*3–6 (Cal. Ct. App. Oct. 31, 2006) (upholding content-neutral requirement that outside demonstrators and leafletters on a college campus get permit).

<sup>248</sup> *See, e.g., UCSB POLICE DEP'T, CRIME REPORT* (2014), available at <http://media.independent.com/news/documents/2014/03/18/UCSB-Police-Report.pdf> (quoting Prof. Mireille Miller-Young, who seized and ripped up a graphic sign that a protester at UC Santa Barbara was holding, as saying that "she found this material offensive because she teaches about women's 'reproductive rights' and is pregnant"); Kelli Krebs, *GAP Overly Graphic*, *THE EAGLE* (Fla. Gulf Coast Univ.), Feb. 5, 2014, Opin. sec., at 1 (arguing that "graphic images" of aborted fetuses "juxtaposed next to images of genocide, slavery and the Holocaust" should be excluded from campus because "there is nothing justified in comparing abortion to the mass extermination of a specific group of living, breathing human beings"); Sandy Van, *Abortion Banners Trigger Backlash from Highlanders*, *HIGHLANDER* (Univ. of Cal. Riverside), May 27, 2014 (quoting a protest organizer who "urged [UC Riverside] administrators to take down the banners" depicting aborted fetuses, on the grounds that "she saw [them] as endangering the safety and reproductive freedoms of a woman" and that "'[h]ate speech is not free speech'"); *Cops Probe Destruction of Pro-Life Display at Ky. University*, *FOXNEWS.COM* (Apr. 14, 2006), <http://www.foxnews.com/story/2006/04/14/cops-probe-destruction-pro-life-display-at-ky-universit-2023533148/> (noting that a university

unconstitutional.<sup>249</sup> But often there will be no evidence of such a motivation, because the government is concerned simply that the gruesome image will disgust and alienate customers, quite apart from its political message. If so, then the gruesome-image restriction is likely to be treated as facially viewpoint-neutral, even though it disproportionately affects some viewpoints.<sup>250</sup> The restriction would still be content-based, but it would be viewpoint-neutral, and that is sufficient in nonpublic fora and limited public fora (as opposed to designated public fora and traditional public fora).<sup>251</sup>

In most nonpublic fora and limited public fora, such restrictions would also be seen as reasonably related to the purposes for which the place is dedicated. Government property is often devoted to getting a job done, and that often requires keeping customers happy. Thus, the Court has upheld a ban on political advertising on buses, partly because “the city is engaged in commerce,” and is trying to provide (among other things) a “pleasant . . . service to . . . commuters.”<sup>252</sup> Municipal transportation systems might likewise want to exclude gruesome images from their advertising.<sup>253</sup> Similarly, a court upheld limits on the display of gruesome images at a fair, partly because the fair was

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professor urged students to destroy a pro-life display even though it did not contain gruesome images); Jessica Harbert & Katie Raynor, *Students Seek Policy Change*, WESTERN FRONT (W. Wash. Univ.) (May 10, 2006), [http://www.westernfrontonline.net/news/article\\_c467077b-ca7a-56b2-b1d2-549c3ea969fd.html](http://www.westernfrontonline.net/news/article_c467077b-ca7a-56b2-b1d2-549c3ea969fd.html) (noting a “petition to ban hate speech from campus”—with over 300 signatures—started in response to an “anti-abortion display,” on the grounds that “the photos of aborted fetuses, lynchings and Holocaust victims bullied and offended women who had abortions or considered having abortions” and thus “degrade[d] or dehumanize[d] members of that group”); Samantha Shelton, *Display Violates University Code of Conduct*, RED & BLACK (Univ. of Ga.) (Nov. 15, 2010), [http://www.redandblack.com/opinion/display-violates-university-code-of-conduct/article\\_ee09e4bb-834c-501d-905f-85f270198a7c.html](http://www.redandblack.com/opinion/display-violates-university-code-of-conduct/article_ee09e4bb-834c-501d-905f-85f270198a7c.html) (arguing that display of gruesome images of aborted fetuses “infring[es] upon the rights, privacy, or privileges” of women who have had abortions, and, by analogizing abortion to the Holocaust, “provokes a disturbance that disrupts the academic pursuits . . . of another person” (second alteration in original)).

<sup>249</sup> See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 808–09, 812–13 (1985); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 49 & n.9 (1983); *Burnham v. Ianni*, 119 F.3d 668, 676 (8th Cir. 1997) (en banc). *United States v. O’Brien*, 391 U.S. 367 (1968), generally rejected inquiries into the subjective motivations of legislatures who voted for speech-restrictive laws, but *Cornelius* and *Perry* show that the matter is different when it comes to the motivations of executive officials who enact speech-restrictive policies.

<sup>250</sup> See *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 695–96 (2010).

<sup>251</sup> See *id.* at 679–80, 679 n.11.

<sup>252</sup> *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974) (plurality opinion).

<sup>253</sup> Cf. *AIDS Action Comm. of Mass., Inc. v. Mass. Bay Transp. Auth.*, 42 F.3d 1, 6–7 (1st Cir. 1994) (noting that the Authority took the view that it could and should exclude photographs of aborted fetuses from ads on its subways and trolley cars, though not having to decide whether the Authority’s position was constitutional).

supposed to be an entertaining commercial event, and fair organizers did not want to alienate the paying attendees.<sup>254</sup>

To be sure, this means that the government can do in nonpublic fora the very things that it may not do in public fora: restrict certain kinds of expression because it is offensive to passersby. The public forum doctrine has been criticized on these grounds,<sup>255</sup> and perhaps it is mistaken.

Nonetheless, the Court has deliberately drawn a distinction here, in part precisely because of the existence of traditional public fora—parks, sidewalks, and streets—in which speech is broadly protected. On government property devoted to more specialized functions (like an airport or bus advertising space), the speech is less protected, partly because the government’s managerial interests are seen as especially strong,<sup>256</sup> and in part because speakers remain free to speak in traditional public fora.<sup>257</sup>

The Court has declined to adopt a highly fact-specific “incompatibility” test, under which speech restrictions on all sorts of government property would be allowed only on “a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning” of the government property.<sup>258</sup> Instead, it has chosen to draw sharper lines, controversial as those lines might be. But given that these lines have been drawn, county fairs, advertising spaces, and the like are treated quite differently from streets and sidewalks, and content-based but viewpoint-neutral speech restrictions on speech in such nonpublic fora (or limited public fora) are generally allowed.

## B. Public Colleges and Universities

The matter should be different, though, in open spaces on public college campuses (assuming student speech is generally permitted in those spaces).<sup>259</sup> Colleges have long seen themselves, and have long

<sup>254</sup> PETA v. Kan. State Fair Bd., 891 F. Supp. 2d 1212, 1227 (D. Kan. 2012) (upholding requirement that videos of gruesome images of animals at a fair be shielded from passersby who hadn’t decided to enter the booth).

<sup>255</sup> See, e.g., Int’l Soc’y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring in the judgments).

<sup>256</sup> See, e.g., United States v. Kokinda, 497 U.S. 720, 732–36 (1990) (plurality opinion).

<sup>257</sup> See, e.g., Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 808–09 (1985); Heffron v. Int’l Soc’y for Krishna Consciousness, Inc., 452 U.S. 640, 654–55 (1981); Greer v. Spock, 424 U.S. 828, 839 (1976).

<sup>258</sup> *Cornelius*, 473 U.S. at 808.

<sup>259</sup> For examples of such restrictions that were attempted on public university campuses, see *Rock for Life–UMBC v. Hrabowski*, 411 F. App’x 541, 543–45 (4th Cir. 2010); *Orin v. Barclay*, 272 F.3d 1207, 1212–13 (9th Cir. 2001); *Milton v. Serrata*, No. C 03–4541 CRB, 2004 WL 2434941, at \*1–2 (N.D. Cal. Oct. 29, 2004); *Samantha Vicent, OSU Settles with Anti-Abortion Student Group in Civil Rights Lawsuit*, TULSA WORLD, Mar. 2, 2014; *Mark Hammontree, Ferguson Center Director Apologizes to Student Group over Display Controversy*,

been seen by courts, as places “traditionally and historically serv[ing] as places specifically designated for the free exchange of ideas.”<sup>260</sup>

As a result, college administrations have often deliberately opened campus space for speech (though subject, as with other places, to content-neutral time, place, and manner restrictions), or at least for speech by students. When that is done, the open spaces on a campus are generally considered “designated public fora,” in which content-based restrictions are generally unconstitutional.<sup>261</sup> The analysis of gruesome speech restrictions in such designated public fora would thus be the same as in traditional public fora, such as parks and sidewalks.<sup>262</sup>

And even if the campus spaces are seen as “limited public fora”<sup>263</sup>—for instance, because a court concludes that the limitation to student speakers make a forum “limited” rather than “designated”—any restrictions on speech in such fora must be both viewpoint-neutral and “reasonable in light of the purpose served by the forum.”<sup>264</sup> When a university generally allows students to use its property “to inform students, faculty and community members,” it cannot

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CRIMSON WHITE (Univ. of Ala.) (Feb. 17, 2014), <http://cw.ua.edu/article/2014/02/ferguson-center-director-issues-apology-to-anti-abortion-group>; *University Of Alabama Removes Pro-Life Display Because It Was Deemed ‘Offensive,’* CBS ATLANTA (Feb. 12, 2014, 11:14 PM), <http://atlanta.cbslocal.com/2014/02/12/university-of-alabama-removes-pro-life-display-because-it-was-deemed-offensive/>. If student speech is generally not allowed in a particular area, and that restriction is constitutional, then of course it could be applied to gruesome images as much as to other speech.

<sup>260</sup> *Bowman v. White*, 444 F.3d 967, 979 (8th Cir. 2006) (citing *Healy v. James*, 408 U.S. 169, 180 (1972)), as “stating that universities represent a ‘marketplace of ideas’”.

<sup>261</sup> See, e.g., *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1062–63 (9th Cir. 2012); *McGlone v. Bell*, 681 F.3d 718, 733 (6th Cir. 2012); *Bloedorn v. Grube*, 631 F.3d 1218, 1230–32 (11th Cir. 2011); *Bowman*, 444 F.3d at 975, 979; *Justice for All v. Faulkner*, 410 F.3d 760, 766–69 (5th Cir. 2005); *Hays Cnty. Guardian v. Supple*, 969 F.2d 111, 116–17 (5th Cir. 1992); *Rock for Life–UMBC*, 411 F. App’x at 551–52 (likewise concluding that strict scrutiny should apply to content-based regulations on such speech, though labeling the location as a “limited public forum” rather than as a “designated public forum”). *Rock for Life–UMBC* involved a display containing images of aborted fetuses. First Amended Verified Complaint, exh. Q, *Rock for Life–UMBC v. Hrabowski*, 594 F. Supp. 2d 598 (D. Md. 2009) (No. 1:08-cv-00811-JFM).

This would be so even if the forum is open only to students. See *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998) (concluding that a designated public forum may be present even if it is “made generally available” only to a particular “class” of speakers); *Justice for All*, 410 F.3d at 766–69 (concluding that even if the university has only opened up the forum for student speech, it is still a designated public forum with respect to that speech).

<sup>262</sup> See *supra* Parts II–III.

<sup>263</sup> See, e.g., *Gilles v. Garland*, 281 F. App’x 501, 511 (6th Cir. 2008); *ACLU v. Mote*, 423 F.3d 438, 444 (4th Cir. 2005).

<sup>264</sup> See *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 685 (2010) (citation omitted) (internal quotation marks omitted).

“unreasonably distinguish[ ] among the types of speech it would allow within the forum.”<sup>265</sup>

In particular, it seems to me, the university cannot exclude speech that some observers may find offensive. *Burnham v. Ianni*, an Eighth Circuit en banc case, offers a helpful analogy here. That case involved a display case in a history department, a forum that is markedly more limited than the open spaces at a university. Nonetheless, the court held that an exclusion of photographs containing faculty members—military history specialists—posing with weapons was not “reasonable,” and was thus unconstitutional, even though the administration concluded that such photographs of weapons were “‘insensitive’ and ‘inappropriate.’”<sup>266</sup>

The display case was designated for precisely the type of activity for which the Kohns and Professors Burnham and Marchese were using it. It was intended to inform students, faculty and community members of events in and interests of the history department. The University was not obligated to create the display case, nor did it have to open the case for use by history department faculty and students. However, once it chose to open the case, it was prevented from unreasonably distinguishing among the types of speech it would allow within the forum. Since the purpose of the case was the dissemination of information about the history department, the suppression of exactly that type of information was simply not reasonable.<sup>267</sup>

The same, I think, is true as to displays that are seen as “inappropriate” because they are too “gruesome.” Once the university opens up a limited public forum for use by speakers “to inform students, faculty and community members” about the speakers’ interests and opinions, it is not constitutionally reasonable—in light of the purposes of the forum, and of the university more broadly—to suppress material that some observers may find offensive.<sup>268</sup>

Universities are rightly seen as places for debate and discussion—and not just rationalistic debate, but emotional and visceral appeals as well (especially when it comes to political demonstrations, rather than

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<sup>265</sup> *Burnham v. Ianni*, 119 F.3d 668, 676 (8th Cir. 1997) (en banc).

<sup>266</sup> *Id.* at 672.

<sup>267</sup> *Id.* at 676 (citation omitted).

<sup>268</sup> The *Burnham* court also concluded that this particular restriction was viewpoint-based (in addition to being unreasonable) because the restriction stemmed from “other persons on the UMD campus object[ing] to this viewpoint [that the study of history necessarily involves a study of military history, including the use of military weapons], or, at least, to allowing this viewpoint to be expressed in this particular way.” *Id.* But, the court went on to say, even if the objections were aimed at “the display of the weapons on the campus” generally, and not at any viewpoint about the military history professors’ curriculum or methods, even “[s]uppression on these more limited grounds . . . would be unconstitutional in light of the purposes served by the display case”—a reference back to the conclusion that the restriction was unreasonable, even apart from any possible viewpoint discrimination. *Id.* at 676 n.13

just classroom or conference presentations). That is a worthy tradition, and one that courts have been rightly defending. Whether university open spaces are treated as designated public fora or as limited public fora, restrictions on offensive political and social advocacy ought not be allowed in such places.

#### CONCLUSION

The Supreme Court has rightly rejected content-based attempts to restrict offensive political and social commentary in public places. This has been true for flag burning, for vulgarity, for racist marches, and more.<sup>269</sup> The same principle ought to apply to gruesome images, whether used to protest abortion, war, the treatment of animals, police violence, or anything else. The desires to shield children, to prevent fights, to prevent traffic distraction, and to prevent offense to passersby shouldn't suffice to restrict such speech.

Broad protection for offensive speech has been a tradition that, I think, has served our country well. It should be maintained for gruesome speech, too.

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<sup>269</sup> See *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123 (1992); *Texas v. Johnson*, 491 U.S. 397 (1989); *Cohen v. California*, 403 U.S. 15 (1971).