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## Who Watches this Stuff?: Videos Depicting Actual Murder and the Need for a Federal Criminal Murder-Video Statute

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## WHO WATCHES THIS STUFF?: VIDEOS DEPICTING ACTUAL MURDER AND THE NEED FOR A FEDERAL CRIMINAL MURDER-VIDEO STATUTE

*Musa K. Farmand, Jr.\**

### Abstract

Murder videos are video recordings that depict the intentional, unlawful killing of one human being by another. Generally, due to their obscene nature, murder videos are absent from mainstream media. However, in the wake of Vester Lee Flanagan II's filmed murders of reporter Allison Parker and cameraman Adam Ward on live television, it is perhaps only a matter of time before murder videos become an acceptable form of entertainment. Further, Americans should be wary of potential "copycat" perpetrators and their thirst for infamy via immortalization on the Internet, as the free dissemination of murder videos provide extra incentive to commit heinous acts for the sake of shock value. Both the societal acceptance of murder videos as entertainment and the emergence of copycat perpetrators pose risks to society that outweigh any benefits viewing murder videos could possibly have. Thus, it is necessary to prevent murder videos from being infinitely viewed on websites hungry for hits.

This Note explores the world of murder videos and why Congress should legally address them immediately. This Note argues that murder videos are obscene content and thus are unprotected by the First Amendment. This Note further argues that a federal statute is necessary to combat murder videos and that a narrowly tailored federal statute can pass constitutional muster. In addition, this Note proposes a model federal statute that can serve as a basis to regulate murder videos. In brief, this Note exposes the current and prospective harms of murder videos and urges that a narrowly tailored federal criminal statute is the proper solution to counter the negative impact murder videos have on society.

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\* J.D., University of Florida, 2017; B.S., University of Florida, 2010. All of my accomplishments I owe to my incredible family and friends, especially to my wife, Laila, to my parents, and to my awesome brothers and sisters, for their unwavering love and support. Many long days and nights kept me from them and their needs, and for that I am forever grateful. They have allowed me to remain selfish in pursuit of my academic goals and have helped me in more ways than they know, and so this Note is dedicated to them. I also want to thank my fellow classmates, especially those on the *Florida Law Review*, and the many faculty members of the Levin College of Law who have made the University of Florida an unforgettable place to attend law school. All of your guidance, support, and competitive efforts are truly inspiring and will always be appreciated.

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INTRODUCTION

Shockingly, there is a market on the Internet for viewing actual cold-blooded murder, suicide, rape, and other heinous acts.<sup>1</sup> Today, it is easier than ever before to record video footage, and it is even easier to upload

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1. See Lesley Anderson, *Snuff: Murder and Torture on the Internet and the People Who Watch It*, VERGE (June 13, 2012, 1:41 PM), <http://www.theverge.com/2012/6/13/3076557/snuff-murder-torture-internet-people-who-watch-it> (“The audience congregates on gore sites (also known as shock sites) like BestGore.com, GoreGrish.com, and theYNC.com. The members of these sites, which are hosted in Canada and the US, respectively, scour the Internet for videos of true-life killings, maiming, torture, and abuse, and post them for millions of fellow gore seekers.”).

video footage to the Internet for the world to see.<sup>2</sup> As a result, not all videos feature newsroom bloopers,<sup>3</sup> musical child prodigies,<sup>4</sup> your beloved pet “Denver,”<sup>5</sup> or the famous baby “Trick Shot Titus,” who can make any basketball shot imaginable on a four-foot hoop.<sup>6</sup> With the help of Vester Lee Flanagan II,<sup>7</sup> who filmed himself murdering reporter Allison Parker and cameraman Adam Ward on live television and uploaded the footage to the Internet,<sup>8</sup> there are now new incentives to kill: infamy in an instant and immortalization on the Internet.

Of course, the “Virginia Shooting”<sup>9</sup> is unfortunately not the first time a murder has been posted on the Internet for the viewing pleasure of the public.<sup>10</sup> Consider the real-life story of murderer Eric Clinton Kirk Newman, now infamously known as Luka Rocco Magnotta.<sup>11</sup> In December 2011, a video of Magnotta suffocating two kittens with a vacuum and a plastic bag, while John Lennon’s “Happy Christmas (War

2. See Paul Boutin, *New Apps to Post Videos with Ease*, N.Y. TIMES (May 4, 2011), <http://www.nytimes.com/2011/05/05/technology/personaltech/05basics.html> (explaining that phones with built-in cameras and video options make it easy to record and post videos to YouTube, Twitter, or Facebook); see also Anderson, *supra* note 1 (“Thanks to the Internet, peoples’ [sic] ability to film and distribute murder to a mass audience has never been easier.”).

3. See, e.g., RockadellEdits, *Best News Bloopers Compilation*, YOUTUBE (Jan. 10, 2013), <https://www.youtube.com/watch?v=wozTHxykDwQ>.

4. See, e.g., ProgressTrain, *Andre Rieu & 3 Year Old Violinist, Akim Kamara 2005*, YOUTUBE (Oct. 14, 2008), <https://www.youtube.com/watch?v=JN2SQ4m7M04>.

5. See Foodplot, *Denver Official Guilty Dog Video*, YOUTUBE (Mar. 8, 2011), <https://www.youtube.com/watch?v=B8ISzF2pryl>.

6. See Trick Shot Titus, *Unbelievable Little Kid Does a Trick Shot Video*, YOUTUBE (Feb. 3, 2013), <https://www.youtube.com/watch?v=qmMbm78sEB4>.

7. Vester Lee Flanagan II used the name “Bryce Williams” when he went on air as a news reporter. He also used the name Bryce Williams for his Twitter and Facebook accounts where he posted the recording he took of himself killing Parker and Ward. See Mariano Castillo, *Who Was Bryce Williams/Vester Flanagan?*, CNN.COM (Aug. 26, 2015, 10:26 PM), <http://www.cnn.com/2015/08/26/us/virginia-shooting-vester-flanagan-bryce-williams/>.

8. See Alex Jones, *Graphic: Shocking Complete Video Shot from Gunman’s Point of View*, INFOWARS.COM (Aug. 26, 2015), <http://www.infowars.com/graphic-shocking-complete-video-shot-from-virginia-gunmans-point-of-view/> (explaining that the footage was taken from Flanagan’s Facebook page and has since been taken down).

9. See Elliot C. McClaughlin & Catherine E. Shoichet, *Police: Bryce Williams Fatally Shoots Self After Killing Journalists on Air*, CNN.COM (Aug. 27, 2015, 2:30 AM), <http://www.cnn.com/2015/08/26/us/virginia-shooting-wdbj/> (recounting in full the events of August 26, 2015, in Moneta, Virginia).

10. See Anderson, *supra* note 1 (concluding that the mid-2000s marked the time when murder videos began circulating, specifically on websites like Ogrish.com, which featured jumpers at the World Trade Center and gruesome political executions).

11. See *Sword and Scale Episode 33*, SWORD & SCALE (Jan. 4, 2015) (streamed from <http://swordandscale.com/sword-and-scale-episode-33/>) (revealing in detail the biography and story of Luka Magnotta); *Who Is Luka Magnotta?*, CBC NEWS (May 30, 2012, 6:50 PM), <http://www.cbc.ca/news/canada/who-is-luka-rocco-magnotta-1.1200147>.

is Over)” played in the background,<sup>12</sup> appeared on several top “gore” websites.<sup>13</sup> Throughout popular gore websites,<sup>14</sup> Magnotta’s animal-torture videos became notorious.<sup>15</sup> However, it was not until May 2012, when bestgore.com<sup>16</sup> posted a video entitled “1 Lunatic 1 Icepick,”<sup>17</sup> that Magnotta received the full attention of the gore world and Canadian authorities.<sup>18</sup> “1 Lunatic 1 Icepick” showed the actual murder of a Chinese international student named Lin Jun.<sup>19</sup> The ten-minute clip, which is still circulating online, featured dismemberment, cannibalism, and necrophilia.<sup>20</sup> However, Lin was not this video’s only victim. In addition to having their son taken from them much too soon, Lin’s parents now must live with their son’s murder infinitely on display for all to see.<sup>21</sup>

The primary issue with murder videos is that they are obscene in every sense of the word and thus are harmful to society: someone films and publicly distributes videos depicting acts that culminate in the intentional, unlawful killing of one person by another. Perhaps most concerning is that murder videos provide a new incentive for people to kill, and the more violent the murder, the more likely the video will generate notoriety.<sup>22</sup> Further, murder videos present the issue of whether victims

12. See Anderson, *supra* note 1 (describing the contents of an animal-cruelty video Magnotta filmed and posted).

13. *Id.* (explaining that “gore” websites are websites that post videos of true-life killings, maiming, torture, and other videos for millions of “gore seekers”).

14. See Saikat Basu, *8 Gory Sites to Get Your Dose of Cheesy Horror*, MAKEUSEOF (Apr. 20, 2012), <http://www.makeuseof.com/tag/8-gory-sites-dose-cheesy-horror-si/> (revealing the plethora of gore sites available on the Internet); see also MrJoeSteam, REDDIT (Apr. 25, 2015), [https://www.reddit.com/r/deepweb/comments/33u3ub/working\\_gore\\_links\\_request/](https://www.reddit.com/r/deepweb/comments/33u3ub/working_gore_links_request/) (providing a list of “gore” websites in response to a blog post).

15. See Anderson, *supra* note 1 (commenting on the notoriety of Magnotta on the Internet due to the many animal-cruelty videos he posted on numerous gore websites).

16. BEST GORE, <http://www.bestgore.com/> (last visited Aug. 17, 2016).

17. See Adrienne Jeffries, *Should You Go to Jail for Posting Video of Real Murder?*, VERGE (Oct. 16, 2013, 6:15 PM), <http://www.theverge.com/2013/10/16/4841522/bestgore-corrupting-public-morals-mark-marek-luka-magnotta> (describing when bestgore.com retrieved the footage of “1 Lunatic 1 Icepick” and how quickly it began circulating on gore websites).

18. See Dominic Gover, *Canada: Luka Magnotta ‘Had Second Victim in 1 Lunatic, 1 Icepick’ Video*, INTERN. BUS. TIMES (Sept. 30, 2014, 3:47 PM), <http://www.ibtimes.co.uk/canada-luka-magnotta-had-second-victim-1-lunatic-1-ice-pick-video-1467903> (revealing when Canadian authorities became aware of the video).

19. Jeffries, *supra* note 17.

20. *Id.*

21. See *id.* (“The most unbearable pain for me is that the video got posted on the Internet . . . People watched it over and over. It’s like my son is being murdered again and again.”).

22. See *supra* notes 14–20 and accompanying text.

possess the right to a private death<sup>23</sup> and whether parents like Lin's have a stake in preventing the unlimited replay of their loved ones' murder on the Internet.<sup>24</sup> The problems associated with murder videos know no boundaries.

This Note explores why the law should address the availability of murder videos, specifically on the Internet, and suggests a solution to the problem. This Note argues that ending the publication and dissemination of murder videos is imperative to protecting societal morale and would not infringe on First Amendment rights. Further, this Note argues that a narrowly tailored federal criminal statute is the proper avenue to achieve this goal.

This Note presents its argument in four Parts. Part I defines what murder videos are and discusses where they are typically found. It then explores the world of gore websites and the reasons murder videos remain available in this market and beyond. Part I also explores the significant harms murder videos can inflict upon society and the negative impact murder videos can have—not only on their featured victims, but also on those who watch them.

Part II explains why current law fails to adequately address murder videos. It examines the regulations already in place to prohibit similarly obscene conduct and notes the absence of specific laws prohibiting the publication and dissemination of murder videos. Part II argues that existing federal criminal laws insufficiently address the dissemination of murder videos and that a federal criminal statute is necessary.

Part III discusses the First Amendment concerns regarding regulating murder videos, as murder videos are considered content-based speech. It explores the significant harms of the dissemination of murder videos in light of the protected speech rights of Internet service providers and distributors. Specifically, Part III argues that murder videos are obscene and therefore fall into an exceptional category of unprotected speech under the First Amendment. Thus, federal regulation of murder videos can pass constitutional muster.

Lastly, Part IV proposes a federal criminal statute that prohibits murder videos. Part IV argues that to be effective, criminal laws

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23. See Brianna Snyder, *Why I Can't Stop Watching Horrifying ISIS Decapitation Videos*, WIRED.COM (Feb. 11, 2015, 8:25 PM), <http://www.wired.com/2015/02/on-watching-gore-and-death-online/> (“Knowing that millions of people—including your family and your friends and your enemies—will watch what should be your private, natural death must be an added psychological torment. And I can't apologize enough to them for contributing to it. My guilt doesn't absolve me of my voyeurism. It only makes me more a part of these victims' abuse and pain. I'm doing what the bad guys want us all to do, which is: watch.”).

24. See Canadian Press, *Jun Lin's Father Releases Impact Statement*, HUFFINGTON POST (Feb. 22, 2015, 5:59 AM), [http://www.huffingtonpost.ca/2014/12/23/jun-lin-father-impact-statement\\_n\\_6373736.html](http://www.huffingtonpost.ca/2014/12/23/jun-lin-father-impact-statement_n_6373736.html) (recounting the statement released by Lin's father, Lin Diran, after Magnotta was found guilty of the first-degree murder of Lin).

prohibiting murder videos must address their obscene nature and must be narrowly tailored to prohibit only videos that depict the unlawful, intentional killing of one person by another. Further, Part IV discusses the exceptions to the proposed statute and how they properly narrow the statute to comport with free speech principles so as to appropriately limit a boundless Internet.

## I. THE AVAILABILITY OF MURDER VIDEOS ON THE INTERNET MUST BE ADDRESSED IMMEDIATELY

The world of murder videos and their potential to grow into a normal and acceptable form of news and entertainment, especially on the Internet, necessitates a thorough understanding of why murder videos are a threat to free speech principles and the moral framework of American society. This Part delves into the world of murder videos and reveals the shocking nature of content readily available to anyone with Internet access. Further, it explains why the dissemination and availability of such obscene content harms not only the victims themselves, but also their families, the individuals who watch murder videos, and ultimately society as a whole. Lastly, this Part examines how the murder-video world influences some to commit murder who, but for the capability of gaining notoriety on the Internet, would not otherwise commit such a heinous act.

### A. *Understanding Murder Videos and Their Market*

The term “murder video” has yet to receive a formal definition from any dictionary or online media outlet. Even Urban Dictionary,<sup>25</sup> the famous website known for providing definitions for vulgar, slang terms, fails to define the term “murder video.”<sup>26</sup> Therefore to understand murder videos and their market, one must begin by examining precisely what they are.

“Murder” is the unlawful killing of one human being by another. According to *Black’s Law Dictionary*, it is “[t]he killing of a human being with malice aforethought.”<sup>27</sup> According to *Oxford Dictionaries*, a “video” is the “recording, reproducing, or broadcasting of moving visual images.”<sup>28</sup> Together, the words “murder video” mean the recording, reproducing, or broadcasting of the intentional, unlawful killing of one

25. URBAN DICTIONARY, <http://www.urbandictionary.com/> (last visited Sept. 26, 2016).

26. See Leslie Kaufman, *For the Word on the Street, Courts Call up an Online Witness*, N.Y. TIMES, (May 20, 2013), <http://www.nytimes.com/2013/05/21/business/media/urban-dictionary-finds-a-place-in-the-courtroom.html> (reporting that a court cited Urban Dictionary in a financial restitution case in Wisconsin).

27. *Murder*, BLACK’S LAW DICTIONARY (10th ed. 2014).

28. *Video*, OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/definition/american\\_english/video](http://www.oxforddictionaries.com/us/definition/american_english/video) (last visited Sept. 26, 2016).

human being by another. However, more common is the term “snuff film,” which *American Heritage Dictionary* defines as “a movie in a purported genre of movies in which an actor is actually murdered or commits suicide.”<sup>29</sup>

To eliminate confusion moving forward, this Note will use the term “murder video,” as there is dispute over whether the term “snuff film” refers to actual murder or fictional murder.<sup>30</sup> For all intents and purposes, murder videos refer to the previously discussed depictions of actual murder.<sup>31</sup> Further, the term “murder video” pinpoints the type of content portrayed as well as the medium. Thus, by using the term “murder video,” there can be no mistake as to the precise content this Note refers to.

Regardless of how murder videos are designated, or what they are called, the prior discussion paints a vivid picture of the type of content being captured and freely dispersed on the Internet. A quick Google search using terms such as “murder videos,” “snuff videos,” “death videos,” or “gore videos” immediately uncovers results leading directly to murder-video links. Among these links are outlets to American websites such as [goregrish.com](http://goregrish.com),<sup>32</sup> [deathtube.net](http://deathtube.net),<sup>33</sup> [liveleak.com](http://liveleak.com),<sup>34</sup> [documentingreality.com](http://documentingreality.com),<sup>35</sup> and of course the notorious Canadian website [bestgore.com](http://bestgore.com)<sup>36</sup>; these are only a few examples of what one can find within a matter of seconds.

These websites became popular as recently as the new millennium, as the availability of Internet access became widespread around the globe and increasing Internet connection speed allowed for video streaming.<sup>37</sup> Thus, it is safe to say that murder videos are a relatively recent genre on the Internet. Within the dark world of these websites, one can easily find images and videos depicting actual death including, but not limited to, beheadings, executions, suicides, murders, electrocution, stoning,

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29. *Snuff Film*, AMERICAN HERITAGE DICTIONARIES, <https://www.ahdictionary.com/word/search.html?q=snuff+film&submit.x=0&submit.y=0> (last visited Sept. 26, 2016).

30. See Scott Aaron Stine, *The Snuff Film: The Making of an Urban Legend*, SKEPTICAL INQUIRER (June 1999), [http://www.csicop.org/si/show/snuff\\_film\\_the\\_making\\_of\\_an\\_urban\\_legend](http://www.csicop.org/si/show/snuff_film_the_making_of_an_urban_legend) (describing the origin of the snuff film and arguing that it was nothing more than a grand marketing scheme).

31. See *supra* notes 14–20 and accompanying text.

32. GOREGRISH, <https://goregrish.com/> (last visited Aug. 17, 2016).

33. DEATHTUBE BLOG, <http://www.deathtube.net/> (last visited Aug. 17, 2016).

34. LIVELEAK, <http://www.liveleak.com/> (last visited Aug. 17, 2016).

35. DOCUMENTING REALTY, <http://www.documentingreality.com/forum/fl66/> (last visited Aug. 17, 2015).

36. BEST GORE, *supra* note 16.

37. See Anderson, *supra* note 1.



torching, and drowning.<sup>38</sup> In addition, many websites like bestgore.com feature images and videos of accidents, such as car and motorcycle accidents; war, including bomb victims and decapitations; and even sexual tragedies, including depictions of rape and necrophilia.<sup>39</sup> One may wonder why these websites are allowed to exist. The short answer is that there is no federal or state law prohibiting them.<sup>40</sup> Such a law would receive strong opposition from the “gore-seeking” community, which would likely argue that any prohibition would violate free speech, an issue this Note addresses below.<sup>41</sup>

### B. *The Problem with Murder Videos*

“Speech can directly inflict harm, and can increase the risk that harm will occur.”<sup>42</sup> The most obvious problem with murder videos is that they literally depict murder in the first degree. First-degree murder is illegal in every state of the Union and punishable by death in many.<sup>43</sup> However, this is certainly not to say that all illegal content should be censored. The problem with murder videos is that they are horrifying,<sup>44</sup> desensitizing,<sup>45</sup> and most importantly obscene, both in the legal sense and in the common-sense understanding of the word.

38. *E.g.*, BEST GORE, *supra* note 16 (“Best Gore website contains gory images and video and depictions of (but not limited to): death, including beheadings, executions, suicides, murders, electrocution, stoning, torching, drowning . . .”).

39. *Id.* (“Best Gore website contains gory images and video and depictions of (but not limited to): accidents, including car crashes, motorcycle crashes, workplace accidents, sexual accidents, animal attacks, war, including bomb victims often involving children, white phosphorus attacks, decapitation of POVs, mass executions, biological warfare, genocide, ethnic cleansing, torture[,] diseases, including poisoning, heart attacks, terminal illness patients, drug abuse[,] weird fetishes, including needle fetish, blood fetish, genital mutilation, body modifications, including self-mutilation and more. . .”).

40. See Catherine A. MacKinnon, *Of Mice and Men: A Feminist Fragment on Animal Rights*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 268, 268–69 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

41. See Anderson, *supra* note 1. The scope of this Note does not extend to regulating images or videos depicting other legal acts. This Note also does not argue that the websites should be shut down.

42. Mark Tushnet, *The First Amendment and Political Risk*, 4 J. LEGAL ANALYSIS 103, 103 (2012).

43. See 18 U.S.C. § 1111 (2012); DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Sept. 26, 2016).

44. See, e.g., The Dnepropetrovsk Maniacs, *3 Guys 1 Hammer*, BESTSHOCKERS (last visited Mar. 22, 2016), <http://www.bestshockers.com/3-guys-1-hammer/> (showing the real video footage of three Ukrainian teenagers, Viktor Sayenko, Igor Suprunyuck, and Alexander Hanzha, gruesomely murdering a man).

45. Jonathon Seiden, *Scream-ing for a Solution: Regulating Hollywood Violence*, 3 U. PA. J. CONST. L. 1010, 1019 (2001) (“Many social scientists argue that violent films and television programs desensitize viewers and create ‘mean world syndrome’ in which the image of a dangerous and violent world is cultivated among young viewers.”).

Further, a victim of murder is obviously unable to consent to the release of his or her murder video. Does a murder victim, or the victim's family members, not possess the right to prevent the widespread disclosure of such a personal tragedy? The debate over whether the victim's family has any stake in a privacy claim or tort claim of intentional infliction of emotional distress against someone who posts or publishes the footage of their loved one's murder is beyond the scope of this Note.<sup>46</sup> However, the harm that a victim's family may suffer from murder videos is evident.<sup>47</sup>

Since this is an extremely recent phenomenon, little research has been conducted on the effect murder videos can have on individuals and society as a whole (other than the fact that at least one person is killed every time a murder video is made). However, in a 2015 study, Dr. Pam Ramsden concluded that viewing violent news events and witnessing human suffering on social media could cause people to experience post-traumatic stress disorder (PTSD).<sup>48</sup> In addition, many recent examples highlight the negative impact murder videos have had on individuals and society, specifically, that they have been used to recruit new soldiers to terrorists organizations.<sup>49</sup> Further, one very real consequence of allowing

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46. For a detailed discussion and state-by-state statute analyses of intentional infliction of emotional distress, see John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 795–98 (2007).

47. “‘It causes me fresh pain to know that my son’s legacy is to be remembered as a victim,’ Lin said in [a] victim impact statement. ‘He not only suffered in his murder but will be humiliated for each time his name is mentioned and it hurts me deeply and will hurt me forever.’” Sidartha Banerjee, *Luka Magnotta Verdict: Guilty of First-Degree Murder*, HUFFINGTON POST (Feb. 21, 2015, 5:59 AM), [http://www.huffingtonpost.ca/2014/12/23/luka-magnotta-verdict-guilty\\_n\\_6371018.html](http://www.huffingtonpost.ca/2014/12/23/luka-magnotta-verdict-guilty_n_6371018.html) (recounting a statement the father of Jun Lin made in regards to his murder and the fact that the account still remains on the Internet).

48. See *Viewing Violent News on Social Media Can Cause Trauma*, BRIT. PSYCHOL. SOC’Y (May 6, 2015), <http://www.bps.org.uk/news/viewing-violent-news-social-media-can-cause-trauma> (“Social media has enabled violent stories and graphic images to be watched by the public in unedited horrific detail. Watching these events and feeling the anguish of those directly experiencing them may impact on our daily lives. In this study we wanted to see if people would experience longer lasting effects such as stress and anxiety, and in some cases post-traumatic stress disorders from viewing these images. . . . It is quite worrying that nearly a quarter of those who viewed the images scored high on clinical measures of PTSD.”); see also Jenny Hope, *Online Videos Can Cause Post-Traumatic Stress Disorder*, DAILYMAIL.COM (May 7, 2015, 2:22 PM), <http://www.dailymail.co.uk/health/article-3071103/Online-videos-cause-post-traumatic-stress-disorder.html>.

49. See Polly Mosendz, *Beheadings as Terror Marketing*, ATLANTIC (Oct. 2, 2014), <http://www.theatlantic.com/international/archive/2014/10/beheadings-as-terror-marketing/381049/> (explaining how beheading videos are used, in America and other countries, to recruit new soldiers to terror organizations); see also Emily Brown, *Murder on Social Media: Killer Wanted the World to Watch*, USA TODAY (Aug. 26, 2015, 8:35 PM), <http://www.usatoday.com/story/news/nation/2015/08/26/two-dead-virginia-shooting-live-tv-social-media/32401101/> (describing

murder videos to remain available on the Internet is the harm that can ensue from a “copycat” perpetrator in search of infamy and immortalization on the Internet.<sup>50</sup>

In explaining the “copycat” perpetrator, journalist Malcolm Gladwell argues that some people have lower thresholds for committing murder and need not be deeply disturbed to contemplate and commit horrific acts.<sup>51</sup> He further argues that the word “copycat,” which is typically used to describe contagious behavior, is misleading, as he believes that a copycat is simply someone who does something that she would never have done unless someone else did it first.<sup>52</sup>

Gladwell predicates his arguments on a theory revealed in sociologist Mark Granovetter’s famous research study called “Threshold Models of Collective Behavior.”<sup>53</sup> Granovetter explains how threshold models are valuable in helping to understand paradoxical situations where outcomes do not seem consistent with the underlying individual preferences,<sup>54</sup> such as murder committed by those society deems least likely to commit murder. Gladwell explains how Granovetter’s threshold model works in the context of a riot (Granovetter’s riot theory), where the thresholds of individuals are tested as they decide whether to throw a rock through a window:

In his view, a riot was not a collection of individuals, each of whom arrived independently at the decision to break windows. A riot was a social process, in which people did

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Vester Flanagan II’s letter to ABC News, which revealed his reason for murdering his former co-workers and broadcasting the footage on social media); Allan Hall, *Blonde Danish Teenager, 15, Murdered Her Mother*, DAILYMAIL.COM (Sept. 17, 2015, 2:37 PM), <http://www.dailymail.co.uk/news/article-3235062/Blonde-Danish-teenager-15-murdered-mother-kitchen-knife-watching-ISIS-videos-beheading-British-hostages-online.html> (reporting the account of a fifteen-year-old Danish teenager who murdered her mother after watching ISIS beheading videos all night).

50. See Anderson, *supra* note 1 (“Bad guys evolve as fast as the rest of the society . . . . We live in an internet age. It’s only normal that the internet became the communication platform for the perpetrators. . . . You won’t see perpetrators mailing letters with words cut out of a newspaper glued onto it to draw attention to their crimes anymore. [A] new generation of violent people will use the internet as a platform of choice for various purposes.” (alteration in original)); see also *Sword and Scale Episode 33*, *supra* note 11.

51. See Malcolm Gladwell, *Thresholds of Violence*, NEW YORKER (Oct. 19, 2015), <http://www.newyorker.com/magazine/2015/10/19/thresholds-of-violence>.

52. *Id.* (“We misleadingly use the word ‘copycat’ to describe contagious behavior—implying that new participants in an epidemic act in a manner identical to the source of their infection. But rioters are not homogeneous. If a riot evolves as it spreads, starting with the hotheaded rock thrower and ending with the upstanding citizen, then rioters are a profoundly heterogeneous group.”).

53. Mark Granovetter, *Threshold Models of Collective Behavior*, 83 AM. J. SOC. 1420 (1978).

54. *Id.* at 1441–42.

things in reaction to and in combination with those around them. Social processes are driven by our *thresholds*—which he [Granovetter] defined as the number of people who need to be doing some activity before we agree to join them. In the elegant theoretical model Granovetter proposed,<sup>55</sup> riots were started by people with a threshold of zero—instigators willing to throw a rock through a window at the slightest provocation. Then comes the person who will throw a rock if someone else goes first. He has a threshold of one. Next in is the person with the threshold of two. His qualms are overcome when he sees the instigator and the instigator’s accomplice. Next to him is someone with a threshold of three, who would never break windows and loot stores unless there were three people right in front of him who were already doing that—and so on up to the hundredth person, a righteous upstanding citizen who nonetheless could set his beliefs aside and grab a camera from the broken window of the electronics store if *everyone* around him was grabbing cameras from the electronics store.<sup>56</sup>

Gladwell proposes that this theory explains why mass shootings, especially in schools, have evolved into an epidemic outbreak in recent decades.<sup>57</sup> Comparatively, it is plausible that Granovetter’s riot theory predicts that copycat perpetrators will evolve similarly in the murder-video world. The same way mass shooters followed in the footsteps of Columbine shooters Eric Harris and Dylan Klebold,<sup>58</sup> others will surely follow through the doors opened by the likes of Vester Flanagan, Luka Magnotta, and the Dnepropetrovsk Maniacs.

Understandably, what makes murder videos an enticing medium for copycat perpetrators is the fact that their actions could be forever available on the Internet, on display for any person with Internet access to see.<sup>59</sup> This enticement could very well lower the threshold of what

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55. *Id.*

56. Gladwell, *supra* note 51 (footnote added).

57. *Id.* (“[W]hat if the way to explain the school-shooting epidemic is to go back and use the Granovetterian model—to think of it as a slow-motion, ever-evolving riot, in which each new participant’s action makes sense in reaction to and in combination with those who came before?”).

58. *Id.* (outlining the succession of mass shootings from 1996 to 2012 and discussing how Harris and Klebold, the Columbine shooters, changed the meaning of Granovetter’s riot theory and heavily influenced the subsequent shooters who mimicked them).

59. See Marcelo Gleiser, *Does the Internet Bring You Immortality?*, NPR (Sept. 5, 2012, 10:09 AM), <http://www.npr.org/sections/13.7/2012/09/04/160530688/does-the-internet-bring-you-immortality> (explaining how the Internet offers a “new kind of immortality” acquired through the accumulated, permanent storage of all information posted on the Internet).

might cause one to commit murder. Gladwell offers an extreme example of this in his analysis of teenage massacre plotter John LaDue, someone with a higher threshold, who fell victim to the evolution of the riot to such a degree that he ended up plotting to kill his own family.<sup>60</sup> Thus, to help prevent murder videos from evolving in the same way as school shootings, it is necessary to limit their availability by ensuring those who post and market them face consequences.

## II. CURRENT LAW DOES NOT ADDRESS MURDER VIDEOS

Neither federal nor state legislation addresses murder videos. This Part briefly discusses other forms of content-based speech prohibited by federal and state law and their similarities to murder videos. Further, this Part introduces the legal definition of obscenity and how courts have interpreted its meaning in regards to First Amendment protection. This Part also demonstrates why a federal criminal law is necessary and discusses how a federal statute would cooperate with § 230 of the Communications Decency Act (CDA).

### A. *Current Law Prohibits Similar Content But Not Murder Videos*

For cable television networks, major news outlets and social media platforms, the decision to show, or not to show, graphic images or videos depicting murder is typically a struggle.<sup>61</sup> However, most cable networks and major publications are bound by their own code of ethics, unlike the Internet, and need not struggle with whether to release videos like “1 Lunatic 1 Icepick.” Still, the proposed legislation within this Note does not exempt major networks and platforms from prosecution under federal law should they make obscene murder videos available to the public.

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60. See, e.g., Gladwell, *supra* note 51 (telling the story of John LaDue, who created an elaborate plan to kill his family and his schoolmates, keeping homemade bombs and multiple guns in a neighborhood storage shed; and using Granovetter’s riot theory to explain, how “the hundredth person,” such as John LaDue, can at one point be content to play with chemistry sets in the basement but then may plan mass murder plots).

61. Eric Levenson, *How and When Media Organizations Decide to Show Murder*, BOSTON.COM (Aug. 27, 2015, 3:45 PM), <http://www.boston.com/news/local/massachusetts/2015/08/27/how-and-when-media-organizations-decide-show-murder/fW2S8awBPeRXEYtT4TNm4I/story.html> (explaining how the decision to display graphic content varies depending on how and through which media outlets the content is delivered, whether the content is necessary to accurately tell the story, and whether there are any major public figures involved); Lauren C. Williams, *The Ethics of Banning a Brutal Beheading Video*, THINKPROGRESS (Aug. 21, 2014, 4:36 PM), <http://thinkprogress.org/world/2014/08/21/3473831/ethics-behind-blocking-foley-beheading-video/> (“Social media platforms, like Twitter and Facebook, have the right to filter content that violates their established policies, and they can choose how to enforce those rules. But the nature of the open Internet makes it harder to draw a line on what should be shared and what shouldn’t.”).

Because no state or federal legislation currently prevents people from publishing and dispersing murder videos across the Internet or the borders of our states,<sup>62</sup> it is necessary to develop a federal statute that holds perpetrators accountable. In 2000, California introduced a bill that would have prohibited snuff films of human beings.<sup>63</sup> However, a massive First Amendment cry from the American Civil Liberties Union (ACLU) prohibited the bill from passing.<sup>64</sup> No part of the bill passed, and no other similar bills have been passed.<sup>65</sup>

However, what does exist is a common law exception to the First Amendment that prohibits the production, publication, and distribution of obscene content.<sup>66</sup> The Constitution does not protect obscene content.<sup>67</sup> Federal regulations on child pornography serve as one example of prohibited obscene material.<sup>68</sup> Similarly, federal legislation, such as § 48, that prevents the production, publication, and distribution of animal “crush” videos also exists.<sup>69</sup> Lastly, it has been similarly argued that “revenge porn”<sup>70</sup> is obscene, and thus a regulation prohibiting revenge porn would stand under the First Amendment.<sup>71</sup>

This raises the question: what exactly does “obscene” mean? Both child pornography and animal crush videos are unprotected by the First Amendment because courts consider them “obscene,” according to the

62. MacKinnon, *supra* note 40, at 268 (explaining how Congress passed a law prohibiting animal crush videos; however, there is no equivalent statute prohibiting a depiction in which a human is intentionally maimed, mutilated, tortured, wounded, or killed to make a film).

63. *See id.* at 268–69.

64. *Id.*

65. *Id.*

66. *See* Roth v. United States, 354 U.S. 476, 485 (1957) (holding that obscenity is not within the area of constitutionally protected speech or press); *see also* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”).

67. *Roth*, 354 U.S. at 485.

68. *See, e.g.*, 18 U.S.C. § 2251 (2012) (prohibiting against the sexual exploitation of children and the production of child pornography); *id.* § 2252 (outlining the consequences of the production, distribution, or receipt of child pornography); *id.* § 2260 (proscribing the production of sexually explicit depictions of a minor for importation into the United States).

69. *See id.* § 48.

70. Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224, 245 (2011) (describing revenge porn as “[h]omemade porn uploaded by an ex girlfriend or (usually) ex boyfriend after [a] particularly vicious breakup as a means of humiliating the ex or just for own amusement” (first alteration in original)).

71. *Cf.* Aubrey Burris, *Hell Hath No Fury Like a Woman Porned: Revenge Porn and the Need for a Federal Nonconsensual Pornography Statute*, 66 FLA. L. REV. 2325, 2347–50 (2014) (explaining how nonconsensual pornography is obscene and thus falls in line with the Supreme Court’s recognition of unprotected speech).

definition provided in *Miller v. California*.<sup>72</sup> So, if we are willing to prohibit viewing child pornography and animal murder, how can we refuse to prohibit viewing the intentional murder of human beings? In *Miller*, the U.S. Supreme Court prescribed the following test for determining whether content-based material is obscene:

The basic guidelines for the trier of fact must be: (a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>73</sup>

Applying this test to depictions of animal cruelty, the Supreme Court held invalid a prior version of § 48 in *United States v. Stevens*.<sup>74</sup> However, the U.S. Court of Appeals for the Fifth Circuit in *United States v. Richards* held that a revised version of § 48 was appropriately limited to unprotected obscenity, and thus, facially constitutional.<sup>75</sup> Currently, *Richards* remains good law, and § 48 is the most analogous legislation to the proposed murder-video statute.<sup>76</sup> For now, it is important to reiterate that the court in *Richards* ruled that animal crush videos could be deemed obscene according to the definition in *Miller*, as opposed to a prescribed definition, which is why the revised version of § 48 stands.<sup>77</sup>

Applying the *Miller* test to murder videos, it is unclear whether murder videos would fall into the category of unprotected obscenity, as certain depictions may fail to satisfy the “prurient interest” or “sexual conduct” elements of the test. However, the court in *Richards* articulated how obscene videos that are not directly sexual in nature can be considered unprotected obscenity.<sup>78</sup> In Section III.B, this Note will

72. 413 U.S. 15, 24 (“A state offense must . . . be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.”).

73. *Id.* (citation omitted).

74. 559 U.S. 460, 461–63 (2010) (holding that 18 U.S.C. § 48 (2000) (effective 1999) was substantially overbroad and thus invalid under the First Amendment essentially because it could have the effect of criminalizing legal conduct), *superseded by statute*, 18 U.S.C. § 48 (2012) (effective 2010), *as recognized in* *United States v. Richards*, 755 F.3d 269 (5th Cir. 2014).

75. 755 F.3d at 279.

76. *Id.*

77. *Id.* at 275–76.

78. *Id.* at 275 (“[A]lthough obscenity may generally apply to materials that depict or describe a more obviously sexual act, case law shows that obscenity can also cover unusual deviant acts.” (quoting H.R. REP. NO. 111-549, at 5 (2010))).

further discuss the ruling in *Richards* and how it could apply to a murder-video statute.

American culture is protective of free expression, in certain contexts even at the expense of personal dignity.<sup>79</sup> Meaning, we value our right to free speech, regardless of the consequences that might ensue; this principle is a cornerstone of American society.<sup>80</sup> However, where should society draw the line, especially when it comes to the boundless dissemination of information on the Internet?<sup>81</sup> Certainly it is not outrageous to think that we should draw a line at obscene video productions depicting acts that culminate in actual cold-blooded murder.<sup>82</sup>

“3 Guys 1 Hammer” is one example of a freely available murder video that serves no societal purpose other than to “shock” those who watch.<sup>83</sup> Similarly, Magnotta’s “1 Lunatic 1 Icepick,” sporting an eerily similar title to “3 Guys 1 Hammer,” indicates that murderers seeking fame are aware of what garners Internet attention.<sup>84</sup> Inspired by the Dnepropetrovsk Maniacs’ “3 Guys 1 Hammer,” Magnotta’s “1 Lunatic 1 Icepick” is proof that copycat perpetrators exist.<sup>85</sup>

It is problematic that current law fails to address murder videos on the Internet, and the foregoing indicates that the problem will continue to evolve and likely get worse. Thus, to fill the void in our current law and to prevent a potential epidemic similar to that of mass-shootings in recent years, it is necessary to craft a narrow federal criminal statute that prohibits the availability of murder videos on the Internet.

79. JON L. MILLS, *PRIVACY IN THE NEW MEDIA AGE* 7 (2015).

80. *Id.*

81. *See id.* (“How do we safeguard personal privacy when any individual can spread intrusive or slanderous information instantaneously, on a global scale?”). With the advent of the Internet and its technological advances, especially regarding video technology, it is difficult to determine where boundaries should be drawn. *Id.* at 6–7.

82. *See* Anderson, *supra* note 1 (describing two teens, known as the “Dnepropetrovsk Maniacs,” who filmed several of their murders with cell phones and created one video called “3 Guys 1 Hammer,” which showed the brutal murder of an older man who was bludgeoned by a hammer and stabbed repeatedly with a screwdriver).

83. *See, e.g.,* LOLSHOCK, <http://www.lolshock.com/> (last visited Aug. 22, 2016) (containing murder videos and other content intended to be offensive and disturbing and of “high shock value,” which is considered “distasteful and crude,” including, but certainly not limited to, “3 Guys 1 Hammer”).

84. *See* *Sword and Scale Episode 33*, *supra* note 11 (revealing the influence “3 Guys 1 Hammer” had on Magnotta and “1 Lunatic 1 Icepick”).

85. *Id.*



### B. Internet Service Providers and CDA § 230

Section 230 of the Communications Decency Act of 1996 (CDA)<sup>86</sup> governs and protects website operators,<sup>87</sup> such as Mark Marek,<sup>88</sup> who are responsible for the operation of gore and snuff sites and the publication of murder videos. The liability of gore-site operators may be construed differently under the CDA,<sup>89</sup> depending on the extent to which the operator engaged in the illegal online conduct and video posts.<sup>90</sup>

Section 230 provides immunity to intermediaries of third-party content.<sup>91</sup> Therefore, if the proposed federal statute within this Note were used only to ban website operators from posting the illegal, murderous actions of a third party, a court would likely rule it invalid.<sup>92</sup> Currently, murder videos remain legal content, and thus so long as a third party has not participated in the murder depicted in the videos, a website provider can post all the murder videos it wants.<sup>93</sup> However, the CDA expressly states that nothing in § 230 can be construed to impair the enforcement of Title 18 or any other federal criminal statute.<sup>94</sup> Thus, a court could criminally charge a website provider or owner for publishing content a federal statute deems illegal.

The underlying goals of the CDA include “ensur[ing] vigorous enforcement of Federal criminal laws to deter and punish trafficking in

86. Pub. L. No. 104-104, 110 Stat. 133 (codified as amended at 47 U.S.C. § 230 (2012)).

87. 47 U.S.C. § 230. While it is generally accepted that operators of gore websites are given immunity for liability under § 230, the language of the CDA statute would still allow internet service providers to be charged if a federal criminal statute came into existence. *See id.*

88. Marek is the website owner and operator of bestgore.com and was charged under Canada’s “corrupting morals” statute for publishing the video of “1 Lunatic 1 Icepick.” Anderson, *supra* note 1.

89. *See* Mary Anne Franks, *The Lawless Internet? Myths and Misconceptions About CDA Section 230*, HUFFINGTON POST (Dec. 18, 2013, 5:35 PM), [http://www.huffingtonpost.com/mary-anne-franks/section-230-the-lawless-internet\\_b\\_4455090.html](http://www.huffingtonpost.com/mary-anne-franks/section-230-the-lawless-internet_b_4455090.html) (describing the misconceptions surrounding various aspects of § 230).

90. The CDA distinguishes “information content providers” from providers of “interactive computer services.” Information content providers are legal persons responsible “in whole or in part, for the creation or development for the creation or development of information,” while an interactive computer service only “provides or enables computer access by multiple users to a computer server.” 47 U.S.C. §§ 230(f)(2)–(3); *see also* Burris, *supra* note 71, at 2344–45.

91. *See* Franks, *supra* note 89 (“[Section] 230 protects intermediaries from liability for the actions of others, not individuals from liability for their own illegal conduct.”).

92. *See* United States v. Stevens, 559 U.S. 460, 480 (2010) (ruling that in the First Amendment context, a court may invalidate a law as overbroad if a statute is not limited to specific types of extreme material).

93. *See* Anderson, *supra* note 1.

94. 47 U.S.C. § 230(e)(1). This provision also states that courts shall not construe § 230 to impair the enforcement of Chapter 71 of the United States Code (relating to obscenity). *Id.* Thus, it is possible that § 230 immunity would not impair the prohibition of murder videos if courts were to enforce that prohibition under obscenity law.

obscenity, stalking, and harassment by means of computer.”<sup>95</sup> Further, courts decide whether a given website is accountable for the development of user content.<sup>96</sup> “The message to website operators is clear: If you don’t encourage illegal content, or design your website to require users to input illegal content, you will be immune.”<sup>97</sup>

Thus, if federal legislation were to make the publication and dissemination of murder videos illegal, then holding website operators liable when they refuse to monitor whether murder videos are published on their websites would be consistent with the CDA’s underlying goals. By enforcing a federal statute that deters trafficking of obscene content by computer, the CDA would align with the federal statute, and the federal statute need not worry about potentially conflicting with another federal law.

### III. THE FIRST AMENDMENT AND MURDER VIDEOS

Not all murders are committed in private, and likewise, not all filmed murders are conducted in private. True to the core of American free speech principles is the underlying rule that the media can disclose any event that happens in public without infringing upon an individual’s privacy, regardless of the content of the occurrence.<sup>98</sup> However, this Note does not attempt to argue that murder videos are about privacy. Rather, this Note, and particularly this Part, only argues that murder videos are obscene content and are an unprotected category of speech under the First Amendment.

#### A. *The First Amendment Does Not Protect All Content-Based Speech*

As a general matter, the First Amendment means the government cannot restrict speech based on its message, ideas, subject matter, or content.<sup>99</sup> Because murder videos are a content-based form of speech,<sup>100</sup> a murder-video statute must deal with First Amendment challenges.<sup>101</sup>

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95. *Id.* § 230(b)(5).

96. Burris, *supra* note 71, at 2345.

97. Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1175 (9th Cir. 2008).

98. See MILLS, *supra* note 79, at 141.

99. United States v. Stevens, 559 U.S. 460, 468 (2010).

100. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015) (“Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase ‘content based’ requires a court to consider whether a regulation of speech ‘on its face’ draws distinctions based on the message a speaker conveys.” (citations omitted)). For a parallel discussion on unprotected forms of speech in regards to “revenge porn,” see Burris, *supra* note 71, at 2346–47.

101. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the

Content-based speech regulations are presumptively unconstitutional because they are based on subject matter.<sup>102</sup>

However, the First Amendment is not absolute and does not protect all categories of speech.<sup>103</sup> If a regulation prohibits content-based speech that falls into an unprotected category, then courts may deem that regulation valid and let it stand under the Constitution.<sup>104</sup> For example, courts consider child pornography obscene content.<sup>105</sup> Because obscene content is an unprotected category of speech, the First Amendment does not invalidate a regulation that prohibits child pornography.<sup>106</sup>

As previously mentioned, murder videos are also a form of content-based speech, which means that any regulation prohibiting the dissemination or availability of murder videos based on their subject matter must satisfy strict scrutiny review.<sup>107</sup> The Supreme Court has said, “If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest.”<sup>108</sup> However, the Court has explained numerous times that content-based speech restrictions need not overcome the strict scrutiny requirement if the prohibited speech falls into an unprotected category.<sup>109</sup> In *United States v. Stevens*, the Court reiterated that unprotected speech includes obscenity.<sup>110</sup>

For the purposes of this Note and the proposed statute, the obscenity element is the most crucial and perhaps the most controversial. American jurisprudence has yet to determine whether murder videos fall into the unprotected speech category of “obscenity.” However, an analogy can be drawn from the Fifth Circuit’s decision in *United States v. Richards*.

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press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”).

102. *Reed*, 135 S. Ct. at 2226 (explaining that the government may only justify content-based laws if it proves they are narrowly tailored to serve a compelling government interest).

103. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992) (explaining constitutional standards of content-based regulations of unprotected speech).

104. *Id.* (defining areas of unprotected speech as those “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality” (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1941))); *see also Virginia v. Black*, 538 U.S. 343, 344–45 (2003) (confirming the Court’s ruling in *R.A.V.* and reiterating that “obscenity” is an unprotected category of speech).

105. *New York v. Ferber*, 458 U.S. 747, 764 (1982) (explaining that there are “limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment”).

106. *Id.*

107. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000).

108. *Id.* (explaining the test for strict scrutiny).

109. *Chaplinsky*, 315 U.S. at 571–72 (ruling that there is an exception to the rule of strict scrutiny for certain well-defined and narrowed classes of speech, including speech regarded as “obscene”).

110. 559 U.S. 460, 468 (2010).

### B. *Murder Videos Fall Under Unprotected Speech*

In analyzing whether murder videos are unprotected speech, it is necessary to further examine how the court in *United States v. Richards* interpreted the *Miller* elements of obscenity.<sup>111</sup> In *Richards*, the court determined that federal statutes that use but do not define the word “obscene” incorporate the *Miller* definition, as noted above.<sup>112</sup> The statute analyzed in *Richards* is the aforementioned animal crush statute, § 48.<sup>113</sup> Like § 48, the proposed statute does not intend to incorporate its own definition of “obscene,” nor does the statute intend to leave out the “prurient interest” or “sexual conduct” requirements.<sup>114</sup> Thus, the proposed statute incorporates the *Miller* definition.

In discussing whether animal crush videos are obscene, the court in *Richards* concluded that they can be, leaving the door open for interpretation depending on the content of the video in question.<sup>115</sup> The court decided that because obscenity is “a separate element of the crime,” it would be “up to the prosecutor to prove and the jury to determine whether a given depiction is obscene.”<sup>116</sup> Thus, § 48 does not prescribe that all animal-cruelty videos are obscene. Rather, § 48 leaves the door open for a perpetrator to be charged and a prosecutor to make a case as to whether certain content is indeed obscene under *Miller*.<sup>117</sup>

In determining that animal crush videos could be obscene under the *Miller* test, particularly under the first two of the three prongs, the court leaned on a number of legislative findings.<sup>118</sup> Although it may not seem obvious that animal crush videos involve the “prurient interest” or “sexual conduct” requirement provided by the *Miller* definition, the court concluded that there is enough of a connection between the prurient interests of individuals and animal crush videos to allow § 48 to pass constitutional muster and stand on its own merits.<sup>119</sup>

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111. *United States v. Richards*, 755 F.3d 269, 274 (5th Cir. 2014) (citing *Miller v. California*, 413 U.S. 15 (1973)).

112. *Id.* (quoting *Miller*, 413 U.S. at 24); see *supra* notes 72–73.

113. *Richards*, 755 F.3d at 274 (citing 18 U.S.C. § 48 (2012)).

114. See *id.* at 275 (comparing § 48 to a different statute that incorporated the element of obscenity but omitted the sexual conduct requirement).

115. *Id.* (noting that in drafting § 48, the Senate was careful to respect the role that courts and juries play in determining obscenity).

116. *Id.* (quoting 156 CONG. REC. S7653 (2010)).

117. *Id.* (noting that “*Miller* and its progeny firmly established the term ‘obscene’ as a legal term of art” (quoting H.R. REP. NO. 111-549, at 5 n.11 (2010))).

118. *Id.*

119. *Id.* at 279.

From the legislative findings, the court determined that certain depictions of animal crush videos appeal to a “specific sexual fetish.”<sup>120</sup> In addition, the court noted that other courts have “applied *Miller* to sadomasochism and that “[a]lthough obscenity may generally apply to materials that depict or describe a more obviously sexual act, case law shows that obscenity can also cover unusual deviant acts.”<sup>121</sup> Therefore, because horrific videos depicting the crushing or killing of animals can appeal to sexual fetishes, crush videos satisfy the first two elements of the *Miller* test.

It follows that if animal crush videos appeal to “prurient interests,” so do murder videos. First, it is evident that murder videos can, and do, appeal to “specific sexual fetishes.”<sup>122</sup> In fact, they appeal to a number of sexual fetishes, including, but not limited to erotophonophilia, masochism, and sadism.<sup>123</sup> As with animal crush videos, there are people, especially men, who watch murder videos simply for sexual satisfaction.<sup>124</sup> Consider one of many websites, [gore2gasm.com](http://gore2gasm.com), which is dedicated to providing both videos of murder and pornography and certain compilations mixing the two together.<sup>125</sup> Additionally, nearly every website previously shared in this Note dedicates their advertising space to an array of pornographic websites with questionable graphic content.<sup>126</sup> Thus, the connection between murder videos and sexual

120. *Id.* at 275 (quoting Animal Crush Video Prohibition Act of 2010, Pub. L. No. 111-294, 124 Stat. 3177 (codified at 18 U.S.C. § 48 (2012))).

121. *Id.* (quoting H.R. REP. NO. 111-549, at 5 n.13).

122. Mark D. Griffiths, *Thrilling Killing and the Disgust of Lust*, PSYCH. TODAY (Aug. 29, 2013), <https://www.psychologytoday.com/blog/in-excess/201308/thrilling-killing-and-the-disgust-lust> (describing the many different connections between sexual interests and murder, including erotophonophilia); see also Jill Harness, *The 12 Most Disturbing Fetishes to Keep You up at Night*, ODDEE (Dec. 9, 2010), [http://www.oddee.com/item\\_97279.aspx](http://www.oddee.com/item_97279.aspx) (describing “erotophonophiles” as people who are sexually stimulated by murder).

123. Harness, *supra* note 122; see also *List of Paraphilias*, PSYCHOLOGIST [http://www.psychologistanywhereanytime.com/sexual\\_problems\\_psychologist/psychologist\\_paraphilias\\_list.htm](http://www.psychologistanywhereanytime.com/sexual_problems_psychologist/psychologist_paraphilias_list.htm) (last visited Aug. 23, 2016) (listing definitions of paraphilias from the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders).

124. Jim Haught, *The Horrifying World of Internet Snuff Sites*, JEZEBEL (Dec. 1, 2011, 3:10 PM), <http://jezebel.com/5863488/the-horrifying-world-of-internet-snuff-sites> (“Some men get erotic thrills from seeing nude young women shot, stabbed, pierced by spears and arrows, or killed in a variety of other ways. And a remarkably large Internet industry has arisen to serve this craving.”). “The woman-killing array is disseminated through sites with names like DeadSkirts, FemmeGore, FemmeFatalities, NecroBabes, Cuddly NecroBabes, Dead Sexy Women, Fatal Fantasies, KillHer Productions, Gladiatrix, Crucified Women, Psycho Thrillers, ChokeChamber, Dark Fetish Network, Drop Dead Gorgeous, Bang Bang Babes, and so forth.” *Id.*

125. GORE2GASM, <http://www.gore2gasm.com> (last visited Aug. 23, 2016) (sporting the mantra, “Where Guts Meet Sluts,” and featuring both “graphic” murder videos, as well as pornography). [Gore2gasm.com](http://gore2gasm.com) is only one of a number of websites that provide the integration of such horrific and degrading content.

126. See GOREGRISH, *supra* note 32. At one point while researching this Note, this website

conduct is not only evident but seemingly necessary for many Internet service providers and website operators as many gore websites double as porn sites.

Further, because murder videos involve people, not animals, they directly appeal to sadomasochism,<sup>127</sup> as opposed to animal crush videos, which are indirectly connected at best.<sup>128</sup> Consider “one of the biggest-selling series in publishing history,”<sup>129</sup> *Fifty Shades of Grey* by E.L. James (*Fifty Shades*). *Fifty Shades* pinpoints the link between sex and murder videos: sadism, which is when the pain or humiliation of a victim becomes sexually exciting to someone.<sup>130</sup> Sadism certainly appeals to prurient interests and is the focal point of many murder videos: many people watch others experience pain precisely because it is sexually exciting to them.

This is not to say that all murder videos appeal to prurient interests or that all people who watch murder videos do so for sexual excitement. However, the fact that murder videos can appeal to a sexual fetish, especially one that actually features sexual acts, such as rape or necrophilia,<sup>131</sup> is enough to satisfy the prurient-interest element. Therefore, there is a clear connection between prurient interests, sexual conduct, and murder videos in the gore world. Thus, murder videos satisfy the first two prongs of the *Miller* test. Further, because of the deviant acts just referenced, murder videos facially “lack serious literary, artistic, political, or scientific value.”<sup>132</sup> At least, as this Note further argues below, this should be the presumption, only to be overcome by the “public good” exception contained in this Note’s proposed statute.

Whether analyzing *Miller*’s elements or simply using common sense, the question to bear in mind is: How can a murder video *not* be presumptively obscene? Murder videos are the epitome of the “unusual deviant acts” discussed in *Miller*. One need only examine the productions of “3 Guys 1 Hammer” or “1 Lunatic 1 Icepick” to give credence to the previous statement.<sup>133</sup>

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featured an advertisement with a link that featured a “tight teen scene.”

127. *List of Paraphilias*, *supra* note 123 (defining “sadism” as “the recurrent urge or behavior involving acts in which the pain or humiliation of the victim is sexually exciting” and “masochism” as “the recurrent urge or behavior of wanting to be humiliated, beaten, bound, or otherwise made to suffer”).

128. *United States v. Richards*, 755 F.3d 269, 279 (5th Cir. 2014).

129. Julie Bosman, *For ‘Fifty Shades of Grey,’ More Than 100 Million Sold*, N.Y. TIMES (Feb. 26, 2014), <http://www.nytimes.com/2014/02/27/business/media/for-fifty-shades-of-grey-more-than-100-million-sold.html>.

130. *See supra* note 127.

131. *See Jeffries*, *supra* note 17.

132. *See supra* note 72.

133. *See id.* (noting that “1 Lunatic 1 Icepick” is “[w]ithout a doubt the sickest thing you will have ever seen in your life”); AphexTwin, *Why Do People Watch Snuff Films and Videos of People Dying?*, REDDIT (Apr. 29, 2014), <https://www.reddit.com/r/AskReddit/comments/24auod/>

Because murder videos satisfy all three prongs of the *Miller* test, they are obscene. Therefore, a federal statute prohibiting murder videos should withstand constitutional muster. Thus, following *Richards* and the court's ruling in regards to § 48 and animal crush videos,<sup>134</sup> murder videos fall under an unprotected category of speech, and Congress can regulate them.

#### IV. A NARROWLY TAILORED FEDERAL CRIMINAL STATUTE TO RESTRICT THE AVAILABILITY OF MURDER VIDEOS

This final Part proposes a comprehensive federal criminal statute narrowly tailored to limit the availability of murder videos, particularly on the Internet. The proposed statute condemns the following actions of any person, regardless of their profession or source of livelihood. The proposed statute addresses the many outlets in which murder videos can be created, published, and distributed while respecting the First Amendment principles concerning content-based speech. Lastly, to further narrow the prohibitions on murder videos, the proposed statute includes certain exceptions.

##### A. Proposed Federal Criminal Murder-Video Statute

Congress should add the following Murder-Video Statute<sup>135</sup> to Title 18 of the United States Code to remedy the problem of murder videos:

(a) Definition—In this section, the term ‘murder video’ means any motion-picture film, video, digital or electronic recording that—

(1) depicts actual conduct in which one or more living human being(s) is intentionally maimed, burned,

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why\_do\_people\_watch\_snuff\_films\_and\_videos\_of/ (describing peoples' reactions after watching murder videos, including specific reactions to both “3 Guys 1 Hammer” and “1 Lunatic 1 Icepick”). These videos are prime examples of “unusual deviant acts.”

134. See *supra* Section III.B; see also *United States v. Richards*, 755 F.3d 269, 279 (5th Cir. 2014) (“We conclude similarly that Congress has a significant interest in preventing the secondary effects of animal crush videos, which promote and require violence and criminal activity.”). If Congress has a significant interest in preventing the secondary effects of animal crush videos, it follows that Congress has an equal, or even greater, interest in preventing the secondary effects of murder videos. Because murder videos involve human beings, rather than animals, one can say, more definitively than for animal crush videos, that murder videos promote and require violence and criminal activity. See *Richards*, 755 F.3d at 279 (“Most importantly, . . . by requiring proof of obscenity, § 48(a)(2) limits § 48(a)(1), which describes the proscribed acts of cruelty.”). Because the proposed statute also requires proof of obscenity, as previously mentioned, it is properly narrowed to target unprotected speech that displays the murder of human beings.

135. This Note primarily borrows the language of the Murder-Video Statute, specifically sections (a), (b), (c), (d), and (e)(2), from 18 U.S.C. § 48 (2012).

drowned, decapitated, crushed, suffocated, impaled, stoned, shot, cut, or otherwise subjected to serious bodily injury (as defined in section 1365<sup>136</sup> and including conduct that, if committed against a person and in the special maritime and territorial jurisdiction of the United States, would violate section 2241<sup>137</sup> or 2242<sup>138</sup>) by another person, or by one's self, and such conduct results in death; and

(2) is obscene.<sup>139</sup>

(b) Prohibitions—

(1) Creation of murder videos—It shall be unlawful for any person to knowingly create or film a murder video, if—

(A) the person intends or has reason to know that the murder video will be distributed in, or using a means or facility of, interstate or foreign commerce; or

(B) the murder video is distributed in, or using a means or facility of, interstate or foreign commerce.

(2) Dissemination of murder videos—It shall be unlawful for any person to knowingly possess, sell, market, advertise, exchange, publish, distribute, or circulate a murder video in, or using a means or facility of, interstate or foreign commerce.

(c) Extraterritorial application—Subsection (b) shall apply to the knowing possession, sale, marketing, advertising, exchange, publication, distribution, dissemination, circulation, or creation of a murder video outside of the United States, if—

(1) the person engaging in such conduct intends or has reason to know that the murder video will be transported into the United States or its territories or possessions; or

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136. 18 U.S.C. § 1365(h)(3) (2012) (“[T]he term ‘serious bodily injury’ means bodily injury which involves—(A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty . . .”).

137. *Id.* § 2241 (recounting the conduct of aggravated sexual abuse by force or threat).

138. *Id.* § 2242 (describing the conduct of sexual abuse in which the victim is threatened or incapable of giving consent).

139. The Note borrows the definition of obscenity from the Supreme Court’s ruling in *Miller v. California*. 413 U.S. 15, 24 (1973). The Murder-Video Statute requires that courts apply the *Miller* test as the Fifth Circuit applied it in *Richards*.



(2) the murder video is transported into the United States or its territories or possessions.

(d) Penalty—Any person who violates subsection (b) shall be fined under this title, imprisoned for not more than 9 years, or both.

(e) Exceptions—

(1) In general—This section shall not apply with regard to any visual depiction if the public good was served by the acts that are alleged to constitute the offense and if the acts alleged did not extend beyond what served the public good—

(A) For the purposes of this section, it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.<sup>140</sup>

(i) In this section, the phrase ‘served the public good’ means disclosure of matters of legitimate public concern including acts that serve a bona fide and legitimate literary, artistic, political, scientific, educational, or other similar newsworthy purpose.<sup>141</sup>

(2) Good-faith distribution—This section shall not apply to the good-faith distribution of a murder video to—

(A) a law enforcement agency; or

(B) a third party for the sole purpose of analysis to determine if referral to a law enforcement agency is appropriate.<sup>142</sup>

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140. This Note borrows this language from Canada Criminal Code, R.S.C. 1985, c C-46, § 163(3), <https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html> [hereinafter Corrupting Morals Statute] (explaining the exceptions to the Corrupting Morals Statute). For a brief analysis of Canada’s Corrupting Morals Statute in regards to Marek, who was charged under Section 163 for posting “1 Lunatic 1 Icpick” on bestgore.com, see Jeffries, *supra* note 17.

141. This Note borrows this language from the third prong of the *Miller* test. *Miller*, 413 U.S. at 24.

142. This Note borrows this language from 18 U.S.C. § 48 (2012).

### B. *Murder-Video Statute Analysis*

The Murder-Video Statute (Statute) seeks to prohibit only the creation and dissemination of obscene motion-picture film or video that depicts the actual conduct of one or more persons who intentionally murder another person or persons. The Statute does not prohibit still images, which may or may not depict the same content. Further, in no way does the statute attempt to prohibit video depictions of any other content-based material that has been deemed illegal, such as drug use, sexual assault, or rape.<sup>143</sup>

To prohibit the distribution and dissemination of murder videos, the Statute primarily relies on Congress's proposal of 18 U.S.C. § 48 and the court's ruling in *Richards*, which held that animal crush videos may be regarded as unprotected obscenity and thus § 48 is facially constitutional.<sup>144</sup> The Statute also relies on the exceptions provided in Canada's Corrupting Morals Statute<sup>145</sup> to narrow it further. In addition, like many federal criminal statutes, the Statute's prohibitions include the language "using a means or facility of, interstate or foreign commerce" as defined in the United States Code.<sup>146</sup> Together, these components create a regulation narrowly tailored to prohibit only murder videos, and the statute is even narrower. What truly narrows the Statute, and should allow it to pass constitutional muster, is twofold: the requirement that the murder video be obscene and thus fall under an unprotected category of speech; and the exceptions articulated in sections (e)(1) and (e)(2) of the Statute, the public-good and good-faith exceptions.

One concern that may arise is whether the prohibited information actually serves the public good in some way, especially if the presumptively prohibited content reveals information regarding national security<sup>147</sup> or other important interests. For example, consider ISIS beheading videos and the websites dedicated to making these videos available to the public.<sup>148</sup> It is debatable whether these murder videos—

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143. Illegal content such as sexual assault and rape fall outside the scope of this Note. However, there is a strong argument that videos incorporating these depictions are also obscene and thus should be left unprotected by the First Amendment. For a similar argument in regards to "revenge porn," see Burris, *supra* note 71, at 2347–50 (explaining that revenge porn is both obscene and a violation of one's privacy and right to consent).

144. See *United States v. Richards*, 755 F.3d 269, 279 (5th Cir. 2014).

145. See *supra* note 140.

146. Many criminal statutes under Title 18 of the United States Code use this language. See, e.g., 18 U.S.C. § 48.

147. See, e.g., Williams, *supra* note 61.

148. Zero Censorship, *ISIS Child Soldier Beheading Syrian Soldier*, ZERO CENSORSHIP (July 7, 2015, 9:39 AM), <http://www.zerocensorship.com/t/uncensored-isis-execution/140758-isis-child-soldier-beheading-syrian-soldier-graphic-video#axzz3vkFi0t6h> (displaying the video of a child cutting off the head of a Syrian soldier).

at a time when the United States, and the rest of the civilized world, is at war with ISIS<sup>149</sup>—would fall under the exception in section (e)(1). According to the Statute, courts would decide whether beheading videos would fall under the exception. Similarly, videos that show terrorist attacks on American soil<sup>150</sup> or abroad,<sup>151</sup> or police brutality on account of race,<sup>152</sup> may also fall under section (e)(1) of the Statute. The key takeaway is that the exceptions allow courts to examine murder videos with a more critical eye. The statute does not automatically convict, without due process of the law, individuals or website operators who make available exceptional videos. Whether a murder video is truly obscene remains for a prosecutor to argue and a jury to decide.

The good-faith exception is an appropriate means of encouraging bystanders to place murder videos in the right hands. This exception is important because the Statute should not deter the public from utilizing the video filming capabilities of cell phones and other advanced technological devices. For example, should a bystander purposely, or accidentally, record someone being shot or murdered in some other way,<sup>153</sup> the Statute would not punish the bystander for having merely recorded the event. The Statute would only come into play if the bystander publicly revealed the murder video through the Internet or other technological outlet instead of turning the footage over to the proper authorities. Depending on the circumstance, the bystander would have the opportunity to utilize the good-faith, or perhaps even the public-good, exception if charged under the Statute.

Surely there are other concerns that may arise from the installment of a federal murder-video statute. However, the elements provided by the Statute, coupled with its exceptions, serve as a foundation for regulating one of the complex problems that has evolved from the Internet. As an immortal and immediate media outlet to anyone with a camera and computer,<sup>154</sup> the Internet must be limited in certain ways to protect

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149. *Defense Secretary Ashton Carter: We Are at War with ISIS*, NBC NEWS (Nov. 19, 2015, 3:16 AM), <http://www.nbcnews.com/storyline/paris-terror-attacks/defense-secretary-ashton-carter-we-are-war-isis-n465991>.

150. Alan Taylor, *The Day of the Attacks*, ATLANTIC (Sept. 8, 2011), <http://www.theatlantic.com/photo/2011/09/911-the-day-of-the-attacks/100143/> (recounting the events of “9/11”).

151. Steve Almasy et al., *Paris Massacre: At Least 128 Killed in Gunfire and Blasts*, CNN.COM (Nov. 14, 2015, 9:48 AM), <http://www.cnn.com/2015/11/13/world/paris-shooting/> (recounting the events of the Paris terror attack).

152. Dana Ford et al., *Chicago Protestors March as Police Release Video of Officer Shooting Teen*, CNN.COM (Nov. 24, 2015, 10:49 PM), <http://www.cnn.com/2015/11/24/us/laquan-mcdonald-chicago-shooting-video/> (showing the video of police shooting Laquan McDonald and the protests that later ensued).

153. Phil Helsel, *Walter Scott Death: Bystander Who Recorder Cop Shooting Speaks Out*, NBC NEWS (Apr. 9, 2015, 11:54 AM), <http://www.nbcnews.com/storyline/walter-scott-shooting/ma-n-who-recorded-walter-scott-being-shot-speaks-out-n338126>.

154. See MILLS, *supra* note 79, at 116.

society and societal morale. The Murder-Video Statute functions only to limit the dissemination of content that depicts the actual, intentional murder of one human by another, content that Congress should regulate for the betterment of society.

#### CONCLUSION

Currently, there is no federal or state legislation that prohibits the creation or dissemination of murder videos. Today, it may not seem that murder videos pose a problem. However, as more perpetrators kill and post videos of the murders on the Internet, and as more people are inevitably exposed to the world of real-life gore and actual murder online, the harmful impact of murder videos will surely evolve over time. If nothing is done to prevent a murder-video epidemic, murder videos will inevitably be viewed as an acceptable form of entertainment, will remain ignored, and will remain an acceptable form of “speech” under the First Amendment. People will commit murder in hopes of gaining shock value, notoriety, and immortalization on the Internet. In addition, human thresholds for committing heinous, unthinkable acts will deteriorate, and society will continue to grow more desensitized to the horrific depictions murder videos reveal.

A federal criminal statute prohibiting the creation and dissemination of murder videos would be a proactive and preemptive visionary act that would be an appropriate way to regulate an extremely thin slice of the Internet. A narrowly tailored federal statute would provide strength in regulating obscene Internet material without infringing upon First Amendment rights. While the Statute cannot prevent the act of murder by individuals, this law can deter future perpetrators who would not ordinarily commit murder but for the capability of gaining notoriety on the Internet. Further, a federal statute can retain societal morale by drawing a line as to what is acceptable content for individuals to post and view on the Internet. The message is clear: society will not afford our citizens the opportunity to infinitely and repeatedly view the actual, intentional murder of one human being by another on the Internet.

