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Abstract

Ten years ago, in *United States v. Stevens*, the United States Supreme Court overturned the federal anti-animal cruelty statute 18 U.S.C. § 48 for the first time. The statute was specifically drafted to target the clandestine underground production of so-called "crush videos," adult entertainment videos depicting animals being purposefully tortured to death by scantily clad women.

The Court overturned the statute for potentially criminalizing portrayals of legal activity with redeeming socio-cultural value, such as hunting. While the Court relied heavily on analyzing speech as it relates to child pornography, it did not address whether depictions of animal torture constitute "obscenity" outside the protection of the First Amendment. Even after the statute was narrowed in 2010 following the *Stevens* decision, it was again criticized in 2014 and 2017 at the appellate level for criminalizing depictions that did not explicitly contain "sexual conduct."

Today, the most current revision to 18 U.S.C. § 48 (2019), titled the "Preventing Animal Cruelty and Torture Act," is still not strong enough to accomplish its intended purpose of preventing depictions of animal cruelty. The statute as written prohibits the sale of "*obscene*" depictions in interstate commerce yet lacks a useful way to interpret exactly what types of content that applies to. This means the statute has a much greater chance of being challenged by a future court on the basis of constitutional overbreadth. To address this, this article proposes two additional changes which would both

1. J.D., University of California, Hastings College of the Law, 2019, B.A., University of California, Los Angeles, 2013. I would like to thank my Professor, Jessica Vapnek, for mentoring me as a legal writer and critical thinker throughout my last two years of law school. Finally, a special thank you to all members of the *Hastings Journal of Crime and Punishment* Volume 1, 2019-2020, for their tremendous efforts.

strengthen its enforcement and improve its likelihood of passing constitutional muster. First, this Article argues that re-classifying crush videos sold for profit under "commercial speech" would make it easier to regulate because commercial speech based on the commission of underlying criminal acts is illegal. Second, this article proposes enhancing the *scienter* language of 18 U.S.C. § 48 with a "prurient intent" element, requiring prosecutors to demonstrate that a particular depiction was made for "prurient" purposes. Because courts would have to closely examine the purpose and intent motivating production of crush video depictions, this would reduce the likelihood of criminalizing protected speech. The statute would therefore be more likely to pass constitutional muster.

This Article has six parts to support its argument. First, it examines the background and legislative history of the federal anti-animal cruelty statute, 18 U.S.C. § 48, including weaknesses of subsequent amendments. Second, the Article dissects both the majority and dissenting opinions of *Stevens* to show how the Supreme Court departed from traditional obscenity analysis in refusing to find the conduct compelling enough to ban outright. Third, to show how the Court could have approached the obscenity issue, this Article discusses First Amendment speech analysis as it relates to regulating depictions of obscene speech in commercial contexts and on the internet. Fourth, this Article reviews other federal and state court interpretations of statutes criminalizing the dissemination of obscene materials to show that there were other options available aside from invalidating for overbreadth. Fifth, this Article argues that re-classifying crush videos sold for profit under "commercial speech" would make it easier to regulate than creating a new category of unprotected speech because commercial speech based on the commission of underlying criminal acts is illegal. Sixth, this Article proposes that enhancing the *scienter* language of 18 U.S.C. § 48 with a "prurient intent" element would strengthen the statute to pass judicial review by requiring prosecutors to use additional circumstantial evidence to demonstrate that a particular depiction was made for "prurient" purposes. Such closer examination into the purpose motivating production of crush video depictions would rule out criminalizing protected speech. In addition, this Article discusses alternative remedies for animal abusers guilty under 18 U.S.C. § 48 and beyond, and suggests a proactive, treatment-based approach to address reducing recidivism in lieu of traditional, reactive incarceration.

I. Introduction

In early 2010 the Supreme Court decided *United States v. Stevens*,[2] holding that depictions of animal cruelty could not be criminalized under 18 U.S.C. § 48 because the statute also penalized individuals who produced videos of injured animals for educational or hunting purposes. In that case, dog trainer Robert Stevens was prosecuted under 18 U.S.C. § 48 for three videos he produced that showed dogs fighting one another and attacking a domestic pig. In January 2005, he was found guilty in a district court for the Western District Court of Pennsylvania. Stevens appealed to the Third Circuit. That court subsequently vacated the lower court's conviction on the basis that the statute itself was not narrowly tailored enough to pass strict scrutiny review, whereupon the government appealed the Supreme Court for final review.[3]

The Supreme Court's decision sent shockwaves through the animal rights' legal community and beyond, as it affirmed that portrayals of animal cruelty could still be protected as "free speech" under the First Amendment.[4] Eight of the nine Supreme Court justices agreed to overturn 18 U.S.C. § 48, just 10 years since its enactment in 1999.[5] The initial intent of Congress in drafting such a statute was to eliminate the distribution of depictions of *extreme* acts of animal cruelty, known colloquially as "animal crush videos."[6] Congress justified restricting this type of speech to stop the distribution of depictions for profit on the internet because state prosecutorial methods were largely ineffective.[7] The Supreme Court majority critiqued the language of the statute for potentially criminalizing too many actions not inherently obscene, finding it impermissibly overbroad.[8] Justice Alito disagreed, arguing that protecting animals against wanton torture should serve as a compelling enough reason to uphold Stevens's convictions for selling videos of dog fights.[9]

Unfortunately, a community of online underground purveyors of "animal crush" videos still thrives today, even somewhat revived since the *Stevens* decision. Forums such as *Reddit* and counterculture site *4Chan* have

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

3. United States v. Stevens, 533 F.3d 218, 237 (3d Cir. 2008).

4. *Id.*; s*ee generally* Brief for The Humane Society of the United States as Amici Curiae Supporting Petitioner, United States v. Stevens, 559 U.S. 460 (2010) (No. 08-769).

5. United States v. Stevens, 559 U.S. 460, 482 (2010).

6. 18 U.S.C. § 48 (1999).

7. 145 Cong. Rec. H10267 (1999).

8. United States v. Stevens, 559 U.S. 460, 481–482.

9. *Id.*

made it easier than ever for users to find and download crush videos—often for a high price.[10] Soon after *Stevens*, an investigation by the Humane Society of the United States revealed an uptick in the use of internet-based payment services such as PayPal and Western Union to facilitate the selling of crush videos online.[11]

Historically, prosecuting the individuals responsible for the distribution of videos in commerce was difficult, even though nearly every state bans the act of animal abuse in itself.[12] This is because applying any single state law that prohibits the selling of animal crush videos is unconstitutional given the interstate nature of the transactions.[13] In reaction to this difficulty, legislators passed the "Preventing Animal Cruelty and Torture Act,"[14] which aims to complement state anti-animal cruelty laws by making the distribution of animal crush videos "in or affecting interstate commerce" a Federal crime.[15] The biggest problem with the latest version of the statute, however, is that individuals may still use loopholes in the vague language of the Act to legally produce and sell crush videos. This is because the language of the Act as written does not make it easy to distinguish obscene depictions of animal cruelty from other recognized categories of obscene speech.

II. Background

A. The Origins of 18 U.S.C. § 48 (1999)

Explicit depictions of animal cruelty in which small animals are harmed, tortured, or killed for the sexual gratification of viewers have existed since the 1950s, but became most apparent during the late 1990s when an underground community began distributing such video depictions for profit over the internet.[16] Between 1997 and 2000, the Humane Society of the United States located 2,000 animal crush videos available for sale between

10. REDDIT (July 18, 2018, 11:43 AM), https://www.reddit.com/r/insanepeopleface book/comments/8zy71x/i_will_pay_you_15000_if_you_brutally_kill_a_tiny/.

11. *Prohibiting Obscene Animal Crush Videos in the Wake of United States v. Stevens Before S. Comm. on the Judiciary*, 111th Cong. (2010), https://www.govinfo.gov/content/pkg/CHRG-111shrg64411/html/CHRG-111shrg64411.htm.

12. H.R. Rep. No. 106-397 (1999).

13. *Id.* at 2 ("As Congress alone has the power to regulate interstate commerce . . .").

14. *Laws That Protect Animals*, ANIMAL LEGAL DEFENSE FUND, https://aldf.org/project/preventing-animal-cruelty-and-torture-pact-act/ (last visited Apr. 12, 2020).

15. 145 Cong. Rec. H10267 (1999).

16. Edward Wong, *Long Island Case Sheds Light on Animal-Mutilation Videos*, N.Y. TIMES (Jan. 25, 2000), at B4.

$30 to $300 each.[17] One estimate gauged the profits of crush videos at just under $1 million annually.[18] Prior to the existence of a federal law which imposed a felony-level charge, those who produced crush videos for commercial gain were only charged with misdemeanor animal abuse.[19]

Even as awareness of crush videos spread beyond the insular communities, not much could be done by state jurisdictions to prohibit sales over the internet. In 1999, members of Congress drafted bill H.R. 1887 to curb the production of "crush" videos in the United States and sold online by criminalizing *any* depiction of "intentional killing" and general torture.[20] The legislative history of the 1999 version of the statute highlights the difficulties of prosecuting a two-fold crime that one, involved the underlying conduct often taking place in private, and two, targeted audiences almost entirely online.

Congress's deliberations on H.R. 1887 in 1999 demonstrated the need for regulating the distribution of obscene or prurient material at the advent of the internet.[21] That year, Congress passed 18 U.S.C. § 48, criminalizing acts of knowingly creating, selling, or possessing only *depictions* capturing animal cruelty, with the intention of placing the video into "interstate or foreign commerce" for profit.[22] 18 U.S.C. § 48 even specifically exempted depictions made for "serious religious, political, scientific, educational, journalistic, historical, or artistic value" as a preliminary attempt to avoid criminalizing free speech.[23] When President Bill Clinton signed the bill, he was aware that the statute posed a First Amendment conflict and explicitly

17. *Id.*

18. Press Release, The Humane Society of the United States, Animal Crush Videos: Senate Committee Testimony (Sept. 15, 2010), https://www.humanesociety.org/news/animal-crush-videos-senate-committee-testimony.

19. *Id.*

20. To Amend Title 18, United States Code, To Punish the Depiction of Animal Cruelty, H.R. 1887, 106th Cong. (1999) (enacted); *see also* Animal Crush Video Prohibition Act of 2010, H.R. 5566, 111th Cong. (2010).

21. 145 Cong. Rec. H10267 (1999). The House of Representatives heard testimony by Bill advocate and Ventura County Deputy District Attorney Tom Connors (one of several Deputy District Attorneys responsible for prosecuting animal abuse cases to testify), who described crush video clips produced by "Steponit Productions." The production company was responsible for distributing clips featuring a woman in boots or high heels speaking in a sexually suggestive manner while slowly crushing small mammals. Connors argued that prosecuting depictions was nearly impossible given the difficulty locating offenders inside the three-year statute of limitations of many states' laws. Connors lauded H.R. 1887 for concentrating on reducing the commercial incentive of making profits post-production by criminalizing the possession and distribution of the videos. *Id.*

22. 18 U.S.C. § 48(a)-(c) (1999) (emphasis added).

23. *Id.*

called for only video depictions capturing "wanton cruelty to animals designed to appeal to a prurient interest in sex," taken as a whole, to apply under the statute.[24] By the mid-2000s, the original sponsors of 18 U.S.C. § 48 stated the prevalence of animal crush videos was considerably declining.[25]

The first federal statute was not without complications, however. In the years following enactment, applying 18 U.S.C. § 48 proved to be difficult in one regard because it contained certain words such as "animal" which varied so widely in definition.[26] For instance, the House Committee intended "animal" to be defined according to its common, rather than scientific name, but because many states have their own definition and a minority of states even limit the definition of animal to only "domestic animals," application of the statute was not entirely clear.[27]

B. The Argument against Robert J. Stevens

In 2004 Robert J. Stevens, owner of a production company "Dogs of Velvet," was charged with violating 18 U.S.C. § 48 after a federal and state investigation concluded that he had been producing and disseminating videos of pit bulls fighting for money and training to hunt dogs.[28] Stevens was charged because the statute's broad definition of animal "cruelty" also criminalized purposeful conduct that resulted in "serious bodily injury" of a nonhuman animal, which included selling depictions of animal fights.[29] The District Court for the Western District of Pennsylvania denied Stevens's motion to dismiss, and a jury unanimously convicted him of three counts of "knowing distribution of depictions of animal cruelty."[30] Stevens was sentenced to thirty-seven months in prison for violating the statute. Stevens

24. 1999 U.S.C.C.A.N. 324, 1999 WL 33178029; *see also* Cassuto, David N., *United States v. Stevens: Win, Loss, or Draw for Animals?*, 2 J. ANIMAL ETHICS 12 (2012).

25. *Stevens*, 559 U.S. at 492; *see also Animal Cruelty*, FREEDOM OF SPEECH (Mar. 18, 2016), https://sites.psu.edu/2civichofman/2016/03/18/animal-cruelty/.

26. Emma Ricaurte, Comment, *Son of Sam and Dog of Sam: Regulating Depictions of Animal Cruelty Through the Use of Criminal Anti-Profit Statutes*, 16 ANIMAL L. 171, 179 (2009).

27. H.R. Rep. 106-397 (1999); *see also* Ricaurte, *supra* note 26, at 178.

28. *Stevens*, 559 U.S. at 466; Recent Case, United States v. Stevens, 533 F.3d 218 (3d Cir. 2008) (en banc), 122 HARV. L. REV. 1239 (2009); *see also Stevens*, 533 F.3d at 221 (describing Stevens selling videos under the guise of "dog training" to avoid getting caught, even though one such particularly disturbing video showed a dog attacking a domestic pig as a "training" exercise).

29. 18 U.S.C.A. § 48 (1999); *see also Stevens*, 533 F.3d at 218.

30. Recent Case, *supra* note 28, at 1240.

appealed on the basis that the statute was on its face overbroad and criminalized or deterred legitimate forms of speech that involved killing animals.[31]

In its petition for certiorari, the government emphasized the statute as intended was to reinforce state law bans, and that the Court should focus on the fact that the "harm from continued sale of the material so outweighs the value of the material that it is appropriate to prohibit . . . such material in [its] entirety."[32] The Government remained adamant that the risk of criminalizing protected speech was minimal and did not justify entirely invalidating the statute.[33]

The Supreme Court granted review on April 20, 2009.[34] On behalf of the majority, Chief Justice Roberts first emphasized that the Court's decision did not limit the ability to prohibit acts of animal cruelty.[35] Rather, Roberts argued it lacked substantial justification to prohibit such speech when acts of depiction not "intrinsically related" to the underlying dangerous or criminal conduct itself.[36] Thus, Roberts rejected the Government's argument that depictions of animal cruelty belong in a class of unprotected speech, because *portrayals* of an illegal underlying act of cruelty depart too far from traditional First Amendment recognized classes of obscenity or the incitement of violence. This was because the majority largely disregarded the *Chaplinsky* balancing test,[37] choosing instead to give much greater weight to the five-factor *Ferber* test designed specifically to evaluate depictions of child pornography.[38] *Ferber*, which was decided over forty years later, presented a unique set of facts that prompted the Court to do more

31. Bond, Jessica, *Some Thoughts for Animal Lovers (and First Amendment Aficionados) in the Wake of United States v. Stevens*, 90 U. DET. MERCY L. REV. 59, 66 (citing *Stevens*, 559 U.S. at 481–483).

32. Petition for a Writ of Certiorari, United States v. Stevens*,* 533 F.3d 218 (3rd Cir. 2008) (No. 08-769).

33. *Id.*

34. United States v. Stevens, 533 F.3d 218 (3d Cir. 2008), *cert. granted*, 556 U.S. 1181 (U.S. April 20, 2009) (No. 08-769).

35. *Stevens*, 559 U.S. at 474–475.

36 *United States v. Stevens*, THE MEDIA COALITION (May 15, 2013), https://www.mediacoalition.org/us-v-stevens/, (citing *Stevens*, 559 U.S. 460, 471).

37. *See id.* at 470–471 (noting that the Court did not heavily weigh the "societal costs" of permitting a market of crush videos); *see generally* Chaplinsky v. United States, 315 U.S. 568 (1942). *Chaplinsky* established a more general "balancing" test that is applicable to measuring the social benefit of obscene speech against the societal interest of order and morality.

38. Recent Case, *supra* note 28, at 1245.

than a cost-benefit analysis.[39] In that case, the Court classified depictions of child pornography on the basis that the material was "intrinsically related" to the underlying crime and harm to children.[40]

Under *Ferber*, Roberts did not find criminalizing depictions of animal abuse to be intrinsically related to preventing animal cruelty. Therefore, Roberts argued the regulated behavior did not rise to a level of "compelling" to justify criminalizing potentially legal speech and did not pass strict scrutiny.[41] Many critics of the decision echoed Robert's argument that the majority over-relied on the facts and reasoning of *Ferber* and under-relied on the past precedent of general obscenity case law allowed the Court make its decision based too closely on the facts of *Ferber*.[42] Section D below will clarify how the *Stevens* Court departed from prior First Amendment precedent in deciding whether to classify categories of speech as protected.

The Court invalidated the statute as overbroad but did not address whether the mere possession of depictions could be constitutionally criminalized.[43] Invalidation was justified because the statute never required depictions of conduct to be "cruel," rather that the conduct be "illegal" in any jurisdiction.[44] This presented another issue of criminalizing conduct illegal in one jurisdiction but not another. The Court was not persuaded by the government's promise to use discretion in prosecuting only "extremely cruel" media, which would exclude videos for journalistic or historic purposes.[45] The Court reasoned that the statute was "problematic" where the criminalization of depictions of wounded or killed animals since it too easily overextended to criminalize videos that did not involve intentional cruelty. The facts of *Stevens* were representative of this problem because the legislative history failed to articulate that the statute intended to target dogfighting videos. The Court also dismissed the government's argument that narrowing the statute's application to a crime after-the-fact would impinge on the legislative branch powers as it would enable the enactment

39. *Stevens*, 559 U.S. at 471 (citing New York v. Ferber 458 U.S. 747, 763 (1982)).

40. *Ferber*, 458 U.S. at 759.

41. *See Stevens*, 599 U.S. at 472 (noting that in the case of child pornography, a New York statute criminalizing the sale and possession of depictions of child pornography departed from the usual obscenity analysis because the depictions were so closely tied to the abuse of children, necessitating a compelling governmental interest in regulating intrastate commerce to prevent underlying acts).

42. *See supra*, note 28, at 1243.

43. *Stevens*, 559 U.S. at 460, 482.

44. *Id.*

45. *Id.*

of ambiguous laws that could be reinterpreted later in time.[46] The decision left open the possibility that a future statute which is more narrowly tailored to address "crush videos" would be more constitutionally sound.[47]

Justice Alito's dissent criticized the Court for not determining whether Steven's tape itself was illegal, nor for remanding back to the Third Circuit for reconsideration on the issue.[48] According to Alito, depictions of animal crushing and torture deserves the same treatment as child pornography, given that the crimes are done strictly for the purpose of recording it. Alito also highlighted the high social value of protecting animals, albeit not as compelling as protecting welfare of minors.[49] Alito focused his argument on the majority's approach to the issue of overbreadth, given that a statute is typically not overturned unless it is "substantially" overbroad.[50] Alito criticized the majority for basing its overbreadth argument on the mere hypothetical chilling of legal speech rather than actual harm. Alito cited *Virginia v. Hicks* to demonstrate this argument that a claimant must prove overbreadth from the "text of [the law] and from actual fact."[51] Alito also felt the Court had a duty to reasonably construe the statute narrowly, or in accordance with the intent of Congress, which was to clearly exclude individuals who possessed videos of hunting, one major concern of the majority.[52] Alito was convinced that in the event a legal depiction was actually criminalized under § 48, it would be merely incidental, but not "substantial" enough to justify overbreadth as the majority feared it would.[53]

Alito also demonstrated that the reasoning of *Ferber,* if applied more accurately to the facts of *Stevens*, could have resulted in upholding the statute because the distribution of obscene material is nearly inseparable from the underlying criminal acts that cannot be prevented any other way.[54] Alito stressed that Congress was faced with only one choice: to ban commercial profit making of lucrative animal crush videos or tolerate the continuation of the underlying criminal acts.[55] Finally, Alito recognized that the United

46. *Id.* at 480.

47. *Id.* at 482; *see also* David LaBahn, LEX CANIS: ASS'N OF PROSECUTING ATT'YS Q., Summer 2010 at 1, https://www.apa-inc.org/wp-content/uploads/2017/08/LC-2.2.pdf.

48. *Id.* at 483 (Alito, S., dissenting).

49. *Id*. at 493–496.

50. *Id.* at 484.

51. Virginia v. Hicks, 539 U.S. 113, 122 (2003) (citing N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 14 (1988)).

52. *Stevens*, 559 U.S. at 487, 490 (Alito, J., dissenting).

53. *Id.* at 489.

54. *Id*. at 494.

55. *Id.* at 495.

States has a longstanding history of condemning intentional acts of cruelty thus speech *depicting* intentional cruelty to animals lacking any redeeming social value should not be protected.[56]

The *Stevens* opinion was criticized not only for the misapplication of *Ferber* but also for disregarding the fact that the underlying conduct was nearly impossible to prosecute.[57] Critics of the opinion expressed frustration as to why the Court invalidated the statute yet upheld depictions of recreational killing, given that depictions of recreational killing lacked enough "serious" value to be protected within one of the statute's exceptions and were not protected as a fundamental right.[58] This interpretation on behalf of the Court was very unusual because the Judicial branch typically must first determine the legislative intent of a statute prior to invalidating it on overbreadth grounds in order to determine whether the regulation is excessive in punishment.[59] The Court's decision not to classify depictions of torturous acts as a new category of obscenity speech due to the absence of an explicitly depiction of "sexual conduct," as well as the lack of a prior "tradition" in doing so, was seen by some as an affront to the progress of animal rights.[60]

Almost immediately after the decision was released, H.R. 5092 and H.R. 5337 were announced and garnered bipartisan support.[61] The proponent behind H.R. 5092, Representative Gary Peters of Michigan, explained the urgency for Congress to enact the new narrower bill given the resurgence of the online community following the ruling.[62] As a result of input from the hearing, H.R. 5566 was introduced in July 2010 by the House of Representatives unanimously as a way to address the Court's main

56. *Id.* at 496.

57. Alison Frankel, *Why violence, but not sex, is protected by the First Amendment*, REUTERS (July 23, 2012), http://www.blogs.reuters.com/alison-frankel/2012/07/23/why-violence-but-not-sex-is-protected-by-the-first-amendment/.

58. Harold Lloyd, *Crushing Animals and Crashing Funerals: The Semiotics of Free Expression*, 12 FIRST AMEND. L. REV. 237, 266–267 (2012).

59. Meredith Shafer, *Perplexing Precedent: United States V. Stevens Confounds A Century of Supreme Court Conventionalism and Redefines The Limits Of "Entertainment"*, 19 VILL. SPORTS & ENT. L.J. 281, 296 (2012).

60. *See* Brief for the Humane Society of the United States as Amicus Curiae, *supra* note 4; *see also* Stevens, 533 F. 3d at 237.

61. David LaBahn, LEX CANIS: ASS'N OF PROSECUTING ATT'YS Q., Summer 2010 Vol. 2 Issue 2 at 1, https://www.apa-inc.org/wp-content/uploads/2017/08/LC-2.2.pdf.

62. *Id.*

concerns.[63] In September 2010, the Senate passed a reformed version of H.R. 5566 known as the Prevention of Interstate Commerce in Animal Crush Videos Act of 2010.[64] This revised Act limited the statute language to "crush videos," addressed conduct illegal under federal or state law, and introduced an exception that excluded various forms of hunting and agricultural practices.[65] At the proceedings and debates of the 111th Congress (second session) Senator Patrick Leahy highlighted well-established First Amendment exceptions that would justify the constitutionality of passing a narrowed statute such as the prohibition of interstate sale of obscene materials and the compelling need to regulate speech integral to criminal conduct.[66] The legislation was signed into law by President Barack Obama in December of 2010.

Unlike the previous version of the law, P.L. 111-294 added a requirement to the statutory language that animal crush videos need to be "obscene."[67] This is significant because the *Stevens* Court, which heavily focused on *Ferber,* did not discuss the meaning of "obscene" as defined in *Miller v. California*, also known as the *Miller* test for obscenity.[68] The *Miller* test for obscenity requires "obscene" material to depict sexual conduct.[69] The *Stevens* reasoning was reflected heavily in the reasoning of *Brown v. Entertainment Merchants Ass'n*, which involved a statute that deliberately left out language that conduct must depict "sexual conduct."[70] In that case, the California law banning the sale of certain violent video games based its definition of "violent video game" on the *Miller* test, which argued for the creation of a new category of unprotected speech. The Court held that because the law tried to create a new category of content-based regulation but was still too vague on the definition of "violent," it was not compelling enough to pass strict scrutiny.[71]

63. KATHERINE A. RUANE, CONG. RESEARCH SERV., R41457, BANNING CRUSH VIDEOS: LEGISLATIVE RESPONSE TO THE SUPREME COURT'S RULING IN U.S. V. STEVENS AND LINGERING FIRST AMENDMENT QUESTIONS 4 (2010).

64. 156 Cong. Rec. S7653, 7653-54 (daily ed. Sept. 28, 2010) (statement of Sen. Durbin).

65. *Id.*

66. *Id.* at 7653-7654 (statement of Sen. Leahy).

67. Animal Crush Video Prohibition Act of 2010, Pub. L. No. 111-294, 124 Stat. 3177.

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

69. *Id.*

70. Brown v. Ent. Merchants Ass'n., 564 U.S. 788, 788-90 (2011).

71. *Id.* at 787.

As of early 2020, the latest update to 18 U.S.C. § 48 was introduced in the House on February 13, 2019, as H.R. 724.[72] The bill expands the criminal provisions to include "intentional acts of crushing" but adds exceptions where a video is made for purpose of euthanizing an animal, necessary to protect life or property, or for scientific reasons.[73] An additional subsection excludes "unintentional" depictions of where an animal is injured or killed.[74] Unfortunately, the language of the new statute does not sufficiently provide a more precise mechanism to determine what qualifies as "*obscene*."[75] The language fails to clarify how the criminalizing of intentional acts of animal crushing on a federal level should be distinguished from conduct that a court does not find to fall into an exception. The bill passed the House and Senate without any changes to the language since its introduction and was signed into law on November 25, 2019, as the "Preventing Animal Cruelty and Torture Act." PACT focuses on prohibiting the sale of depictions in interstate commerce, rather than articulate what constitutes an "obscene" depiction.[76]

C. Balancing the Interaction between the First Amendment, Obscene Speech, and Freedom of Religion

The following section is a discussion of obscenity analysis generally and how it relates to *Stevens*, given that much of the Court's reasoning in that decision was based on prior case law regarding laws that attempted to regulate obscene speech.[77]

i. Regulating the Freedom of Speech and Categorizing "Obscene" Speech

The Free Speech Clause of the First Amendment prohibits the government from regulating speech on the basis of viewpoint and subject matter, in order to promote a marketplace of ideas and self-governance.[78] *Roth v. United States* was the first case to distinguish First Amendment

72. Preventing Animal Cruelty and Torture Act or the PACT Act, H.R. 724, 116th Cong. (2019).

73. *Id*.

74. *Id.*

75. *Id.*

76. Animal Crush Video Prohibition Act of 2010, Pub. L. No. 111-294, 124 Stat. 3177.

77. Michael Reynolds, *Depictions of the Pig Roast: Restricting Violent Speech Without Burning the House*, 82 S. CAL. L. REV. 341, 377–78 (2009).

78. U.S. Const. amend. I., cl.2.

protections from speech considered "obscene."[79] In 1948, the Court struck down as vague a section of the New York penal code that attempted to criminalize the possession or circulation of "obscene, lewd, lascivious … magazines," in *Winters v. New York.*[80] The court in *Winters* was concerned that the statute was too broad and abridged free speech by prohibiting the circulation of "stories of deeds or bloodshed or lust."[81]

Nearly thirty years later, the constitutional restriction for laws prohibiting the distribution of generally obscene materials was limited to materials of a "prurient" nature based on a three-part test.[82] *United States v. Miller* involved the criminalization of dissemination of advertisements and brochures containing "adult material" mailed to recipients who found the images of fornication disturbing and alerted the police.[83] The Court introduced a novel test to evaluate whether the regulating of "pornographic" conduct of the brochures was protected by the First Amendment.[84] This new *Miller* test exempted any speech considered prurient and not containing serious "redeeming" purpose was not protected free speech under the First Amendment and further specified that "sexual conduct" could include representations of those sexual acts.[85]

79. *See* Roth v. United States, 354 U.S. 476, 483, 488–89 (1957); *see also* Jacobellis v. Ohio, 378 U.S. 184, 188 (Stewart, J., concurring) (highlighting that obscenity does not have a bright line). In the early days of obscenity recognition, distinguishing when protected speech crossed into obscenity was based on Justice Stewart's "I know it when I see it" determination. Jacobellis v. Ohio, 378 U.S. 184, 197; *see also* Regina v. Hicklin, (1868) L.R. 3 Q.B. 360. Whereas *Roth* was the first United States case to establish a common law standard of obscenity, *Regina* "allowed [potentially obscene] material to be judged merely by the effect of an isolated except upon particularly susceptible persons." *Id*.

80. *See* Winters v. N.Y., 333 U.S. 507 (1948). *Winters* was among the first obscenity cases to discuss the constitutionality of laws prohibiting the *distribution* of generically obscene materials.

81. *Id.* at 518.

82. *See* Miller v. California, 413 U.S. 15, 21 (1973).

83. *Id.* at 36. Miller, who owned an adult-content printing company, was charged with violating a California penal code section criminalizing the intentional dissemination of any obscene matter.

84. *Id.* at 24, 36.

85. *Id.* at 24. When offensive content satisfies all prongs of the *Miller* test, it is considered "obscene." That is, 1) that the average person applying contemporary standards would find that the work (considered in the whole) appeals to prurient interests, 2) whether the work depicts or describes in a patently offensive way, sexual conduct defined by the applicable state law, and 3) whether the work as a whole lacks serious literary, artistic, political, or scientific value. *Id.* at 21.

Nine years after *United States v. Miller*, the Court in *New York v. Ferber* declared depictions of child pornography unprotected speech.[86] *Ferber* departed from the *Miller* three-prong test which was specifically based on laws regulating the depictions of pornographic content. The Court described the need to greatly adjust the *Miller* test given the *visual* depictions of underage sexual exhibitions.[87] The *Ferber* Court was satisfied with the connection between visual depictions and underlying conduct because the possibility of also prohibiting legal speech was *de minimis*, given the underlying criminal conduct lacked redeeming value.[88]

The application of the *Ferber* analysis in *Stevens* ran contrary to other First Amendment cases decided around the same time including *American Booksellers Foundation for Free Expression, et al. v. Ted Strickland, Richard Cordroy, et al.*[89] Following Ferber, the Court in *Osbourne v. Ohio* limited the child pornography exception to acts of mere possession but did not extend categorical protection to the mere possession of obscene materials.[90] The Court in *Osborne v. Ohio* also upheld a law that criminalized any virtual depictions of child pornography.[91] *Ferber* and *Osborne* both weighed the constitutionality of statutes that criminalized depictions and possession of child pornography statutes. Unlike the reasoning in *Stevens,* the Court's reasoning undermined the statute for its hypothetical overbreadth, the Court in both *Ferber* and *Osborne* was reluctant to overturn the statutes entirely because of a small hypothetical number of depictions with value.[92]

The progression of case law on depictions of obscene material from *Winters* to *Miller* to *Ferber* demonstrates that courts have been reluctant to consider depictions of criminal acts as "obscenity" unless the depiction concerns a crime of human interest, such as harm to children. However, one

86. New York v. Ferber, 458 U.S. 747, 774 (1982). Justice White found that the test for obscenity did not need to be equated with the prurient interests of the average person by a community standard, nor even be considered "as a whole." *Id.* at 764. It was therefore held that visual *depictions* and *communications* of child pornography, even if not obscene, are not protected under the First Amendment because of the substantial link to child abuse. *Id.* at 773.

87. *Id.* at 764. A New York statute was upheld for prohibiting persons from promoting sexual performances by children under the age of sixteen by restricting the distribution of material depicting those performances.

88. *Id.* at 756.

89. *See generally* Am. Booksellers Found. for Free Expression v. Strickland, 560 F.3d 443 (6th Cir. 2009).

90. *See generally* Osborne v. Ohio, 495 U.S. 103 (1990), and Stanley v. Georgia, 394 U.S. 557, 564–568 (1969).

91. *Osborne*, 495 U.S. 103.

92. *See supra*, notes 86 and 90.

problem in extending the *Miller* obscenity framework to cases involving the distribution of obscene content is the challenge of developing a singular objective "contemporary community standard"[93] by which to evaluate the conduct.[94] Thus, it is difficult to interpret a federal law such as 18 U.S.C. § 48 given the dynamic contemporary community standards of the internet.[95] Recall Justice Alito dissented that there is a strong connection between regulating depiction of videos in order to target the underlying crime. Therefore, depictions of animal crush or cruelty may easily be taken out of context without the presence of additional language to clarify that only specific content which applies to "prurient interests" should be regulated by 18 U.S.C. § 48. The fact that the current amended version of 18 U.S.C. § 48 still lacks a limiting instruction that a particular depiction be "taken as a whole" by a court indicates the statute remains weak.

A limiting instruction would remedy over-inclusiveness so that a depiction be "taken as a whole." Under such an instruction, depictions of *intentional* cruelty to animals would only be viewed as "criminal" under 18 U.S.C. § 48 if the primary purpose of the Act targets creation for prurient interests, or can be exempted by serving a culturally significant purpose. It is important to note that the addition of such narrowing language would likely exclude depictions of dogfighting or cockfighting, the conduct that Stevens was arrested for filming.

ii. Anti-Animal Cruelty Statutes and the Freedom of Religion

Preventing animal cruelty and preserving the freedom of religion presents a unique problem for courts in deciding cases because it involves prosecuting intentional acts of abuse that are codified as illegal but are essential practices in some religions. Like laws regulating free speech, laws aimed at limiting religious practices must also meet strict scrutiny. The

93. *Miller*, 413 U.S. at 30. Recall that *Roth* and subsequently *Miller* adopted the "community standard" requirement to measure whether "prurient" material "offended the common conscience of the community by present-day standards." Roth v. United States, 354 U.S. 476, 490 (1957).

94. *Id*. ("The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion).

95. David L. Hudson Jr., *Pornography & Obscenity*, FREEDOM FORUM INSTITUTE (July 2009), https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/adult-entertainment/pornography-obscenity/.

following section examines how the courts balanced upholding First Amendment freedom of religion with the desire to preserve animal lives.

The analysis balancing anti-animal cruelty statutes and the freedom of religion changed after the seminal *Employment Division, Department of Human Resources v. Smith* in which the Court upheld Oregon's right to deny unemployment insurance to those using peyote for religious purposes.[96] The Court found it immaterial that the use of peyote was considered criminal under the state law because the law was neutral and the effect of inhibiting any religious freedom was incidental.[97] When the Court decided *Stevens*, it had been nearly twenty years since it had last heard a case involving the First Amendment and Free Exercise Clause. Prior to *Smith* in 1990, the Court was required to adhere to the "strict scrutiny" test—satisfaction of which requires the government to show that the law is narrowly tailored to further a compelling interest—to justify restricting speech or religion.[98]

Smith established that a law must *intentionally* discriminate against a religious practice or have the effect of discriminating in order to be deemed invalid or unconstitutional.[99] The Court determined that "neutral, generally applicable" criminal statutes need only pass the lower threshold of rational basis.[100] "Neutral, generally applicable" statutes are likely to pass rational basis if their purpose is rationally related to a legitimate government interest. For example, a "neutral, generally applicable" law prohibiting certain slaughtering techniques on the grounds of animal cruelty would be constitutional under *Smith* because it lacks intentional motive to discriminate. Therefore, applying the *Smith* reasoning would likely ensure that a more neutrally worded statute would only incidentally burden the right to free speech and thus be more likely to pass rational basis review.

Three years after *Smith*, the Supreme Court decided the first seminal case involving an anti-animal cruelty statute and the freedom of religion. In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court considered the question of whether laws preventing animal cruelty rose to the level of compelling state interest against the interests of followers seeking to preserve the ways of the Santeria religion.[101] The Court in *Lukumi* overturned a city ordinance that banned intentional killings of chickens and goats for sacrificial ceremonies. The *Lukumi* Court did not apply the *Smith* framework because the act *facially* discriminated against the Santeria

96. Emp. Division, Dep't of Hum. Resources of Or. v. Smith, 485 U.S. 660 (1990).

97. *Id*. at 885.

98. *Id*.

99. *Id*. at 676.

100. *Id*. at 665.

101. Church of Lukumi Babalu Aye, Inc. V. City of Hialeah, 508 U.S. 520 (1993).

religion rather than inadvertently, unlike the prohibition of peyote in *Employment Division*.[102] The Court in *Lukumi* also refused to decide if the protection of animals was a "compelling interest."[103] The Court's aversion to deciding this issue arises because the law treats animals differently in regard to their role and proximity to humans in society. The Humane Slaughter Rule, for instance, protects grazing cattle but not chickens and turkeys.[104] Since the law only protects certain animals from certain types of treatment and the societal interests in protecting animals differs depending on their purpose, determining if a compelling interest applies to all animals is difficult.

In *Stevens,* the majority relied on *Lukumi* to make the case that depictions of animal abuse were not compelling enough to justify the First Amendment violations. In his dissent, Alito distinguished the universally applicability of 18 U.S.C. § 48 criminalization of crush videos from the ordinance specifically tailored to target the Santeria religion in *Lukumi*.

A more fact-specific inquiry could focus on existing laws, animals involved, and degree of public concern. This means that prior case law on unprotected categories of speech allows finding one type of wanton cruelty or killing to be barred as a compelling interest while another form of killing is permitted. The above section illustrates how the Supreme Court has interpreted laws designed to stop the harmful effects of intentional animal cruelty when such laws inhibit the Freedom of Religion.

iii. An Argument for Regulating Depictions of Intentional Animal Cruelty as Commercial Speech

There are nine officially recognized categories of speech not protected by the First Amendment. These include obscenity, fighting words, defamation, perjury, blackmail, incitement of lawless action, actual threats, solicitation to commit a crime, and child pornography.[105] Over the past fifty years, the Supreme Court has been increasingly less inclined to recognize new categories of unprotected speech.[106] This trend is rooted in the Court's

102. *See generally Church of Lukumi Babalu Aye, Inc.*, 508 U.S. 520 (1993).

103. *Id.* at 546–547.

104. *See* Cassuto, *supra* note 24, at 15.

105. KATHLEEN ANN RUANE, CONG. RESEARCH SERV., 95815*,* FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT, 1 (2010).

106. Chicago-Kent College of Law at Illinois Institute of Technology, *Animal Cruelty, Crush Videos and* US v. Stevens*,* YOUTUBE (July 25, 2014), https://www.youtube.com/watch?v=vjwm-aQlrFE.

consideration of categories of speech based only on a tradition of proscription rather than what the legislature finds "shocking."[107]

Stevens changed the way a court determines if speech should be categorized as protected under the First Amendment,[108] given its departure from the traditional cost-benefit balancing test used to gauge unprotectable obscenity speech.[109] Consider the Court's focus on the fact that depictions of animal cruelty do not have longstanding historical tradition of being prohibited.[110] The majority's reasoning did not consider that the statute may be a necessary step to ending the criminal practice of animal abuse.[111]

Regulating the for-profit animal crush industry as "commercial speech" presents one option to make it easier for such laws to pass judicial review. This is because speech is considered commercial when it "regards solely the economic interests of the speaker and its audience."[112] Commercial speech has historically required that a statute meet "intermediate scrutiny."[113] This means that laws regulating commercial speech are valid if supported by "substantial" government interest and are not illegal or misleading. The Supreme Court has found that commercial speech that which incites illegal activity, to be unprotected speech.[114] For example, a "content-neutral" anti-animal cruelty statute could pass judicial review if enacted with the purpose of targeting the commercial aspect of advertising and distributing *all* depictions of animal abuse that meet the definition of intentional criminal animal abuse under state law. Therefore, categorizing animal crush videos as "commercial speech" given that they are profit-driven, advertised for to some degree, and highly likely to incite illegal activity creates one potential path to outlawing such videos.

107. *Ent. Merchants Ass'n.*, 564 U.S. at 792.

108. *See, e.g.*, Charles W. Rhodes, *The Historical Approach to Unprotected Speech and the Quantitative Analysis of Overbreadth*, *in* United States v. Stevens, 2010 EMERGING ISSUES 5227 (LexisNexis July 30, 2010).

109. *See* Cassuto, *supra* note 24.

110. *See supra,* note 86.

111. Cassuto, *supra* note 24 at 17.

112. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980).

113. *Id.* at 573.

114. *Id.* at 571–572.

D. Regulating Interstate Speech and the Commerce Clause

The legislative record of section 48 illustrates that Congress's intent to use its interstate commerce power to supplement the authority of the states to bring those who profit from animal abuse to justice.[115] State law is nearly ineffective at regulating and criminalizing individuals who sell obscene content across jurisdictions over the internet because many crush videos are purposely made in anonymity to avoid identification for prosecution under animal cruelty laws. Even if prosecutors are able to identify the actors, there is no way to verify where videos are made and whether they are within the applicable statute of limitations since it runs from the date the conduct occurred.[116] More specifically, the statute of limitations to prosecute individuals under many state laws begins when the *depiction* of intentional abusive conduct was made or distributed and not.[117] Therefore, the importance of a strong federal ban on depictions of inherent animal cruelty (that are also clearly produced for self-gratification purposes only) was necessary as the reach of state laws were largely ineffective.

Congress has attempted to regulate obscenity on the internet in a number of ways.[118] In 1996, Congress passed the Communications Decency Act of 1996, which was only partially upheld after *Reno v. ACLU* struck down parts of it down for clashing with the First Amendment.[119] The *Miller* test (as discussed in Section C, *supra*) for obscenity was applied to material displayed on the Internet seven years before *Stevens*, when the Court ruled on the regulation of obscenity over the Internet. In *Ashcroft v. ACLU*, the Child Online Protection Act (COPA) was challenged because it criminalized material that was legal for adults to view, thereby unconstitutionally chilling

115. *See* H.R. Rep. No. 106-397, at 8 (1999) (citing 145 CONG. REC. H10267-01 (daily ed. Oct. 19, 1999) (statement of Rep. McCollum) (discussing Congressional authority to regulate interstate commerce of illegal goods for profit)).

116. Shafer, *supra* note 59, at 283.

117. *Id.*

118. *See, e.g.*, Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997) (finding a New York statute unconstitutional for violating the Dormant Commerce Clause by regulating content accessible in other states under New York law). The *Pataki* Court stated that criminalizing potentially legal user activities over the internet would violate regulatory powers that prohibit the government from exercising authority beyond its boundaries. *Id.* at 169. This produced a chilling effect beyond the state's ability to prosecute website owners, potentially resulting in the inconsistent and uncertain application of multiple states' laws over the same content. *See also*, PSInet, Inc. v. Chapman, 372 F.3d 227 (4th Cir. 2004) (finding a Virginia statute that banned the "knowing display for commercial purpose" of pornographic materials over the internet placed undue burden on interstate Commerce by restricting access to online materials in another state's jurisdiction).

119. Reno v. Am. Civil Liberties Union, 521 U.S. 844, 846-47 (1997).

speech.[120] In *Ashcroft,* the Court recognized the importance of construing statutes in a modern lens, taking into account the use of local community standards. The Supreme Court in that case found that COPA violated the First Amendment for condemning legal conduct and because the software did not protect children using the least restrictive means possible.[121] The Court rejected, however, Respondent's argument that the statute was overbroad where only "some" overbreadth was demonstrated, holding that any basis for overbreadth must be both real and substantial.[122]

As a Federal statute, 18 U.S.C. § 48 invokes the Commerce Clause because the statute attempts to regulate the distribution of commercial media for profits on interstate "channels" such as the internet. Case law from the past two decades has swung *against* the regulation of online activities by statute under the intricacies of the Commerce Clause and Dormant Commerce Clause.[123] Thus, federal statutes passed to regulate the transmission of obscene content on the internet (as 18 U.S.C. § 48) face another obstacles for being unconstitutional against state powers. The passage of the latest form of 18 U.S.C. § 48 in 2019 clearly highlights the reliance on the Commerce Clause powers to regulate certain speech when necessary.[124]

While many opponents of 18 U.S.C. § 48 initially claimed that state laws already made illegal the act itself, they failed to recognize the power of Congress to regulate mechanisms of interstate commerce. Given the heightened ability to produce, disseminate, and sell content generally over the Internet today, the Commerce Clause can and has been used to regulate instrumentalities of trade, thus it was imperative for state legislators to incorporate the Clause's principles into the latest version of 18 U.S.C. § 48 (2019). "PACT" as written today embraces the Commerce Clause and

120. *See* Ashcroft v. ACLU, 535 U.S. 564, 568. (In that case, the Court of Appeals had difficulty interpreting a statute that imposed a $50,000 fine and six months in prison for the distribution of obscene material "harmful to minors" using the extremely broad "community standard" (also discussed above) because such a standard for obscenity varied greatly on internet.).

121. *Id.* at 571–572.

122. *Id.* at 584.

123. *Id.*

124. *Cf.* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 496 (1982) (in *Hoffman Estates,* the Supreme Court ruled on an ordinance aimed at prohibited all marketing of drug paraphernalia unless the publisher possessed a license. The owner of a paraphernalia store challenged the ordinance as vague and potentially overbroad. The Court upheld the ordinance and refused to apply the overbreadth doctrine, reiterating that the overbreadth does not apply to the regulation of commercial speech. This was because the language of the statute regulated only commercial marketing behavior and reiterated that the government may ban speech which proposes an illegal transaction.).

expressly prohibits both depictions of wanton abuse on federal property or in interstate commerce and the underlying act itself. However, the federal act is still weak where it does not address the potential of criminalizing free speech even with the use of exceptions. Finally, "PACT" does not rewrite the 2010 version, but only applies to depictions that are distributed in interstate commerce or on federal property, leaving some of the previous statute's weaknesses exposed. Even the most recent version of 18 U.S.C. § 48 could be strengthened as a statute and pass judicial review if it instead aimed to regulate depictions made for profit for sale as "commercial speech," which has historically been regulated according to intermediate scrutiny.[125]

Speech is considered "commercial" when it regards commercial advertising, promises, and solicitations.[126] This is because laws regulating commercial speech are valid if supported by "substantial" government interest and are not illegal or misleading. The Supreme Court found in 1980 that commercial speech which is misleading or promotes illegal activity is not protected by the First Amendment, even if only the underlying activity is banned.[127] In *Central Hudson Gas & Electric Corp. v. Public Service Comm'n.*, the Court reiterated that laws regulating commercial speech as the offspring of economic self-interest and are not "particularly susceptible to being [invalidated] by overbroad regulation."[128] Because Congress used its Commerce Clause power in passing 18 U.S.C. § 48 (2019), future courts should approach distributions of animal crush videos as inherently "commercial" in their reasoning. A more pragmatic anti-animal cruelty statute could *expressly* regulate the "commercial speech" aspect of advertising and distributing depictions, particularly because statutes that regulate commercial speech are incapable of being overbroad.[129] Doing so may help resolve some of the loopholes created by having undefined "exceptions" where such depictions of animal crushing or abuse would be considered legal.

125. Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995).

126. *See* Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562 (1980).

127. *See id*. at 563–564.

128. *Id.* at 564, n.6.

129. *See* Hudson, *supra* note 95.

E. Other Alternatives to Getting 18 U.S.C. § 48 around Judicial Review

The Court in *Stevens* determined that the purpose of 18 U.S.C. § 48 did not satisfy a "compelling governmental interest" by a test normally applied only to depictions of child pornography rather than the traditional test for obscenity. The following section explains why 18 U.S.C § 48 had such a high constitutional threshold to pass and discusses how restructuring the language of the state may help it pass judicial review in the future.

Recall that the Court in *Stevens* did not find that preventing underlying crimes of animal abuse was enough to justify preserving the law, despite numerous amicus briefs, such as the one filed by Northwest Animal Rights Network, that articulated how criminalizing depictions of animal abuse was just as compelling as other unprotected types of speech. The brief provided numerous examples of causal links between flagrant animal abuse and other types of violence against others, as well as why it is necessary for the federal government to have a carefully drafted legislative mechanism to ensure humane treatment of animals. Rejecting these arguments, the Court was heavily persuaded by the fact that federal regulation of depictions of animal cruelty was less compelling because nearly every state already criminalizes intentional animal abuse.

When legislators attempt to criminalize the *depictions* of speech, the federal government has the burden to prove their justification in inhibiting that speech. Regulating an activity based on the content of the speech itself requires the government satisfy strict scrutiny.[130] Part of the next challenge in reworking 18 U.S.C. § 48 will be to frame the statute in such a way so that it is not content-based but is content-neutral. A law is content-neutral (and requires only intermediate scrutiny) when it applies to all expression without regard to the substance or message of expression.[131] The content-neutrality of a statute is ensured if it regulates *all* intentional acts of criminal abuse under state law without criminalizing legal conduct. Redrafting 18 U.S.C. § 48 to be neutrally applicable means a Court would be less inclined to strike it down for being overbroad.

130. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2228 (2015).

131. David L. Hudson Jr., *Content Neutral*, THE FIRST AMEND. ENCYCLOPEDIA (last visited May 2, 2020), https://mtsu.edu/first-amendment/article/937/content-neutral (Intermediate scrutiny requires the government need only demonstrate that the regulation of speech is done for an *important* governmental purpose and is narrowly tailored to accomplish that purpose).

III. How Other Courts Have Interpreted Similar Laws that Impinge on Protected First Amendment Speech Rights

There is a dearth of case law discussing how federal courts have ruled on the constitutionality of statutes criminalizing depictions of animal cruelty. To provide perspective, it is important to show how different statutes that attempt to criminalize the dissemination of obscene materials have fared under the law.

A. Sixth Circuit Court of Appeals

The Sixth Circuit initially heard *American Booksellers Foundation for Free Expression, et al. v. Ted Strickland, Richard Cordray, et al.* to certify two questions of law as to the proper interpretation of Ohio Revised Code § 2907.01 subparts (E) and (J).[132] Subpart (E) prohibited the distribution or display of certain sexually explicit materials considered "harmful to juveniles" whereas subpart (D) prohibited the "[remote transmission] by means of a method of mass distribution."[133] The language of § 2907.01 was amended prior to appeal to explicitly state that the statute only applied to "personally directed" communications (such as instant messaging and chat rooms), not "generally accessible" communications (accessible publicly).[134] At the district level, Plaintiffs argued that both subparts of (D) were overbroad and resulted in chilling adult-to-adult speech, given that it was unclear when an individual would have knowledge of the legality of materials they were prosecuted for possessing.[135] The district court found that the definition of "material harmful to minors" failed the *Miller* test because it also criminalized legal speech, such as adults in possession of such material.[136] The Sixth Circuit certified both questions, and the outcome of both questions was resolved in 2010 by the Ohio Supreme Court, which held the statute should be limited in scope only to electronic communications that can be "personally directed" rather than means of mass distribution which do not allow a sender to prevent distribution to particular recipients.[137]

The *American Booksellers* cases demonstrates that courts demand a greater level of certainty where a vague criminal statute may "induce

132. *See generally* Am. Booksellers Found. for Free Expression v. Strickland, 560 F.3d 443, 446 (6th Cir. 2009).

133. *Id*. at 445–446.

134. *Id*. at 447.

135. *Id*. at 444.

136. *Id.*

137. *See* Am. Booksellers Found. v. Cordray, 124 Ohio St. 3d 329, 332.

individuals to forgo their rights of speech, press, and association" to avoid a threat of prosecution and chilling speech.[138]

B. Florida

In *Gonzalez v. State*, Defendant Sebastian Gonzalez was charged under Florida statute § 828.122(3)(h) for "knowingly" using an animal for the purpose of fighting another animal. Mr. Gonzalez was the first to challenge the constitutionality of the statute on the grounds of overbreadth given that innocent bystanders lacking intent could also be prosecuted.[139] The court used the reasoning from a similar Tennessee case to find the statute constitutional, in which the court distinguished from prohibiting *knowingly* being present at an animal fight from just being present at an unlawful animal fight. Gonzalez also challenged the statutory language for failing to define "attend" and requested that the court construe the statute in his favor (Rule of Lenity).[140] Ultimately, the court held that the statute was not vague because the language was clear and unambiguous, thus the "clear and plain meaning prevails."[141] *Gonzalez* demonstrated the importance of sufficiently articulating the level of intent required to penalize an individual for producing a depiction.[142]

The statutory vagueness discussed in *Gonzalez* is similar to what the majority in *Stevens* latched on to in their reasoning. The court in *Gonzalez* pointed out that the legislature's choice of words such as "wound" and "kill" did not evince that depictions need to be of "cruel" nature to be criminal. Such broad language ultimately convinced the Court that the specific words used should be construed per their plain meanings to reduce the risk of

138. *See also* KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner, 647 F. Supp. 2d 857, 888 (N.D. Ohio 2009).

139. Gonzalez v. State, 941 So. 2d 1226, 1227–28 (Fla. Dist. Ct. App. 2006). *See also* Kerry Adams, *Punishing Depictions of Animal Cruelty: Unconstitutional or a Valid Restriction on Speech?*, 12 BARRY L. REV. 203 (citing Complaint at 2, Advanced Consulting and Marketing Inc. v. Gonzales, No. 1:o7cv21767, 2007 WL 2049319 (S.D. Fla. July 10, 2007)). *Advanced Consulting and Marketing Inc. v. Gonzales* was among one of the first suits to challenge the constitutionality of banning depictions of conduct legal in another jurisdiction under 18 U.S.C. § 48. *Advance Consulting and Marketing Inc.* represents the dilemma of criminalizing depictions accessible over the internet where the underlying conduct was legal where it was produced.

140. *Gonzalez*, 941 So. 2d at 1229 (explaining that the Rule of Lenity describes a tool of statutory interpretation where an ambiguity in language is so grievous the court must guess as to meaning). *See generally* Barber v. Thomas, 560 U. S. 474, 488 (2010).

141. *Gonzalez*, 941 So. 2d at 1229.

142. *Id.*

convicting individuals for legal conduct.[143] While the most current version of 18 U.S.C. § 48 does articulate the required mens rea as "purposefully," *Gonzalez* also demonstrates that if the actual crime itself is not defined clearly, the Court must interpret the plain meaning in favor of the defendant.[144] Appling the principle of clear statutory construction from *Gonzalez* to *Stevens* underscores the necessity for future versions of the statutes to focus on the specific type of intent needed and provide better definitions of intent for the Court.

C. Pennsylvania

In Pennsylvania, *Free Speech Coalition, Inc. v. Sessions* was the final decision of multiple cases regarding the First Amendment constitutionality of a statute that required producers of adult sexually explicit imagery to maintain detailed records of each performer.[145] Although the cases did not concern depictions of animal cruelty, they involve the constitutionality of injunctions prohibiting depictions and overbreadth of the statute. The District Court upheld injunctions in favor of the producer-Plaintiffs where it found certain provisions to be unconstitutional but ultimately rejected their facial overbreadth claim.[146] The court concluded that there was no longer a clear dividing line between remedies that are proper when a statute is either "facially" unconstitutional or unconstitutional "as applied."[147] Analogizing to *Stevens*, in which the government in that case argued for a limited interpretation of "depictions of animal cruelty" to apply to only "extreme" animal cruelty, the Court in *Free Speech Coalition (I)* reasoned it could not engage in essentially "rewriting" statutes.[148] Soon after, the Court in *Free Speech Coalition (II)* decided *against* limiting the reach of the statute and only upheld the provisions of the statute that were the least restrictive means of accomplishing the statute's goals. District Judge Michael Baylson described the difficulty of facial attacks to statutes for overbreadth stating, "there is no longer a strict dividing line between the relief that would be proper when a statute is facially unconstitutional, as opposed to a statute

143. *See* Shafer, *supra* note 59, at 314.

144. Gonzalez *supra*, note 135.

145. *See generally* Free Speech Coal., Inc. v. Sessions, 322 F. Supp. 3d 605 (E.D. Pa. 2018) (stating that the statute would have violated the test for substantive overbreadth by criminalizing adult entertainment professionals for legal conduct).

146. *Id*. at 612.

147. *Free Speech Coal., Inc.*, F. Supp. 3d at 612 (E.D. Pa. 2018).

148. *See* Free Speech Coal., Inc. v. AG of the United States, 677 F.3d 519, 539 (3d Cir. 2013). *Cf.* Free Speech Coal., Inc. v. AG United States, 787 F.3d 142.

being declared unconstitutional."[149] This grey area highlights the power the Court has to invalidate a statute entirely or limit its application on a case by case basis so that something of value may still come out of the decision. If this reasoning had been applied to *Stevens*, the Court could have ruled on part of the statute rather than striking it down entirely for being overbroad.

D. Fifth Circuit Court of Appeals

Following *Stevens,* the Fifth Circuit decided *United States v. Richards*, the reasoning of which reflected ongoing weaknesses of the 2010 revisions to 18 U.S.C. § 48. The facts of *Richards,* unlike *Stevens,* involved the prosecution of animal crush videos where defendant Ashley Nicole Richards and her accomplice Brent Justice restrained animals and tortured them to death on camera while making sexually suggestive comments in the background.[150] The Fifth Circuit Court of Appeals rejected this argument and highlighted that § 48 fit within the "secondary effects" exception which permits a statute to regulate a content-based subclass based on its secondary effects, or the "wanton killing and torture" behind animal crush videos.[151] In reaching its decision, the Court of Appeals extensively referred to the Congressional intent as a tool to narrow the proper interpretation of animal crush videos independent of traditional violence-obscenity statutes and worth of "special punishment."[152]

In deciding *Richards*, the court applied the *Miller* obscenity test (discussed previously) to the added "*obscene*" requirement of 18 U.S.C. § 48, meaning conduct would be considered obscene if it met the three-part test for prurience. The Court did not address the point raised by the majority in *Stevens* that depictions must be of sexual conduct. This issue was raised three years later when the Fifth Circuit heard *United States v. Justice* in 2017.

On appeal, the Court in *Justice* addressed in the appeal the narrower question of whether the depictions of animal crushing constituted sexual conduct in a patently offensive way.[153] Defendant-cameraman Brent Justice argued that the depictions did not constitute an example of the patently offensive sexual conduct provided in *Miller*.[154] The Court of Appeals concluded that the obscenity of the videos be factually evaluated case-by-

149. *Free Speech Coal., Inc.*, 322 F. Supp. 3d at 611.

150. United States v. Richards, 755 F.3d 269, 271–72 (5th Cir. 2014).

151. *Id.* at 277 (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)).

152. *Id.* at 277.

153. United States v. Justice, 703 Fed. App'x 345, 346 (5th Cir. 2017).

154. *Id.*

case in their totality.[155] The Court upheld the conviction as to videos containing sexual conduct but vacated the count of one video that did not involve sexual conduct but was clearly created to appeal to prurient interests.[156]

If the drafters of 18 U.S.C. § 48 had previously included a subjective prurient intent requirement, Justice's argument would have likely been preempted before being heard on appeal. This is because the intent behind the creation of the crush videos in question would likely have satisfied the above requirement and the Court would not have needed to address whether the conduct depicted was inherently "sexual" in nature. Whereas the Court's favorable interpretation of "*obscene*" under *Miller* permitted a more constitutional reading of the 18 U.S.C. § 48 in *Richards*, the subsequent acquittal of Defendant Justice demonstrates the ongoing need for strengthening the statute before it is challenged once again.

IV. Statutory Overbreadth and the Feasibility of Adding a Prurience Test to the Scienter Requirement of 18 U.S.C. § 48

As was apparent in *United States v. Richards* (which challenged the obscenity of 18 U.S.C. § 48) the issue with statutory *specificity* still exists today in the language of the current proposed legislation to refine 18 U.S.C. § 48.[157] This issue presents a roadblock because no court has provided a tool for interpreting the statute's vague "obscene" requirement. Child pornography statutes, which contain the same "obscene" language, are won or lost based on the language of the statute.[158] The following section discusses the background of statutory overbreadth, which is invoked when a statute impermissibly attempts to regulate obscene speech while incidentally regulating legal speech. The next section also describes of the purpose of scienter requirements and how one such requirement may alleviate the constitutional problems of 18 U.S.C. § 48.

155. *Id.* at 346–347.

156. *Id.* at 347.

157. *See* United States v. Richards, 940 F. Supp. 2d 548 (S.D. Tex. 2013).

158. Brian Verbon Cash, *Images of Innocence or Guilt?: The Status of Laws Regulating Child Pornography on the Federal Level and in Alabama and an Evaluation of the Case Against Barnes & Noble*, 51 ALA. L. REV. 793, 818 (2000).

A. Statutory Overbreadth and How to Resolve It

The modern overbreadth doctrine permits defendants whose speech is not constitutionally protected to facially invalidate a statute on behalf of third parties whose speech may be chilled by the law in question.[159] Laws that regulate substantially more speech than constitutionally prescribed are considered impermissibly overbroad.[160] Historically, the Overbreadth Doctrine was viewed as either a "last resort" or heavily condemned,[161] and facial overbreadth has not been applied when a limiting construction exists on the challenged statute.[162] Following the Hughes Court (which handed down *Thornhill v. Alabama*[163]) and the "free-speech friendly" Warren Court, emerged the Burger Court, which adopted more aggressive approach of invalidating statutes on their face if they overstepped on speech interests.[164]

The Court in *Younger v. Harris* restricted any court from enjoining the enforcement of a statute *solely* on the basis of a showing that the statute "on its face" impedes First Amendment rights (absent extraordinary circumstances), because doing so would contravene the basic functions of the judicial branch.[165] In *Younger*, the Supreme Court invalidated a statute for overbreadth, ruling that the statute could not be enforced until the state's courts provided a narrowing construction.[166]

Statutory overbreadth threatens the constitutionality of many criminal statutes because it presents the risk of criminalizing individuals for legal conduct. In order to satisfy due process, a statute must be sufficiently definite in terms of the conduct it is regulating so that a reasonable person understands what the statute is prohibiting.[167] Overbreadth of a statute must be resolved even before a court can consider whether an underlying crime or

159. *See* Broadrick v. Oklahoma, 413 U.S. 601, 613–15 (1973).

160. *See* United States v. Williams, 553 U.S. 285, 292 (2008).

161. *See* L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 39 (1999).

162. *See* Williams, 553 U.S. 285, at 293; *see also* Richards, 940 F. Supp. 2d 548, at 614.

163. *See generally* Thornhill v. Alabama, 310 U.S. 88 (1940) (the Supreme Court carved out a protection for peaceful labor picketing speech even though situations where picketers marched with signs that went beyond the particular labor dispute would be heard again later by the Court).

164. Richard H. Fallon Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 863–864 (1991). *See also* Younger v. Harris, 401 U.S. (1971) ("We do not think that opinion stands for the proposition that a federal court can properly enjoin enforcement of a statute solely on the basis of a showing that the statute 'on its face' abridges First Amendment rights.").

165. *Younger*, 401 U.S. at 53.

166. *Id.* at 50–51.

167. Kathryn E. Brown, *Stranger than Fiction: Modern Designer Drugs and the Federal Controlled Substances Analogue Act*, 47 ARIZ. ST. L.J. 449, 466 (2015).

conduct is compelling, which explains why the Court in *Stevens* spent a majority of its reasoning on the issue of surface validity but could not address the constitutional question presented.

The doctrine of overbreadth is applied to laws by one of two approaches.[168] When the government attempts to regulate speech based on its content, it must address whether the content falls within an already protected category. The Supreme Court has designated some categories of speech such as "fighting words" and "obscenity" to be beyond the purview of First Amendment protection, and the government may regulate or ban speech within these categories on the basis of content.[169] The other approach is applied to laws that concern speech already fully protected under the First Amendment. In those cases, even if the speech is harmful the state cannot regulate it based on content unless there it is necessary to advance a compelling government interest.[170] Alternatively, a court will apply a more lenient "balancing" test when a regulation is neutral with respect to the content for the purpose of promoting interests unrelated to the message of regulated speech.[171]

Overturning a statute for overbreadth is rare and often a last resort,[172] but the Court did so in *Stevens* because of the numerous hypotheticals raised.[173] By focusing on the hypothetical unconstitutional applications, the Court never addressed the more important question of whether a law criminalizing crush videos could be constitutional.[174] While the interpretation of some parts of 18 U.S.C. § 48 were clarified following *Richards* and again in *Justice*, the language of the statute still remains too broad.

B. The Doctrine and Purpose of "Scienter" Requirements in Criminal Statutes

This article argues that the addition of a properly tailored scienter requirement to 18 U.S.C. § 48 would strengthen the goals of the statute's purpose and help to accomplish the intent of Congress to prohibit animal cruelty for valueless entertainment.

168. Fallon, *supra* note 161, at 864.
169. Fallon, *supra* note 161, at 864.
170. Fallon, *supra* note 161, at 864–865.
171. Fallon, *supra* note 161, at 865.
172. LaBahn, *supra* note 47.
173. Shafer, *supra* note 59, at 330.
174. Shafer, *supra* note 59, at 325.

Many criminal statutes include an element of scienter that must be proven beyond a reasonable doubt.[175] The Supreme Court has determined the *absence* of a scienter requirement in an obscenity ordinance "may tend to work a substantial restriction on the freedom of speech and of the press."[176] This highlights how important it is for certain criminal statutes to articulate the necessary mens rea to find individuals guilty. *Roth v. United States* held that the conduct of the defendant is often of more importance than the obscenity of the material.[177] Later, the Court in *Ferber* expressly did not include a scienter requirement in its five-part test, but provided that "criminal responsibility may not be imposed without some element of scienter on part of the defendant."[178]

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C. Assessing the Challenges of Including a Subjective "Prurient Intent" Element in 18 U.S.C. § 48

Recall that the Department of Justice was instructed to narrowly construe the statute such that only videos of depictions that primarily appealed to salacious interests should be prosecuted.[179] This section argues that redrafting the statute by manipulating the language of the scienter requirement further by specifically adding a "prurient intent" element would allow a Federal Court to more narrowly apply the statute in future cases.

Also recall that the outcome of *Stevens* largely resulted from the statute failing to require "cruelty" in addition to requisite intent.[180] As discussed above, even the most recent amendment of 18 U.S.C. § 48 still falls short of

175. *Scienter*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "scienter" as "defendant's previous knowledge of the cause which lead to the injury complained of, or rather a defendant's previous knowledge of a state of facts which it was his duty to guard against and his omission to do which has led to the injury complained of").

176. Smith v. Cal., 361 U.S. 147, 150.

177. Roth v. United States, 354 U.S. 476, 495 (1957) (Warren, C.J., concurring).

178. New York v. Ferber, 458 U.S. 747, 765 (1982).

179. Kerry Adams, *Punishing Depictions of Animal Cruelty: Unconstitutional or a Valid Restriction on Speech?*, 12 BARRY L. REV. 1, 203, 221 (2009) (noting that "in President Clinton's signing statement, he stated that the Justice Department should construe the law narrowly … [to limit it to] 'wanton cruelty to animals designed to appeal to a prurient interest in sex'").

180. *Stevens*, 559 U.S. at 474. *See* 18 U.S.C.A. § 48 (2019).

defining what makes acts of animal cruelty "obscene."[181] This makes it incredibly hard for a Court to interpret actual intent without further direction, and without overstepping into a legislative role. This issue with language interpretation is common in child pornography cases where, for example, the state law requires that material be "*obscene*" but does not define it.[182] As a result, the burden on the prosecution to prove "*obscene*" is difficult when the defendant only needs to introduce reasonable doubt as to whether the facts meet that definition.[183]

One Alabama case highlights the importance of an appropriately tailored scienter requirement when a statute involves the criminalization of "*obscene*" speech that is ill-defined and potentially criminalizes artistic expression.[184] In 1998, Barnes & Noble was charged for possession of child pornography contained within two photo books stocked in the store, *Radiant Identities* and *Age of Innocence*. Whereas *Ferber* established that child pornography was outside the scope of protection if it involved "scienter" and depiction of sexual conduct,[185] Barnes & Noble argued the images were protected under the First Amendment for their redeeming artistic value. However, the Alabama child pornography statute in question (enacted two years after *Ferber*) modified the definition of "*obscenity*" to include depictions of breast nudity.[186] Thus, the Court weighed evidence as to the intent of the authors behind the images to determine if images of simple nudity could be considered obscene.[187] Even though the case was dismissed, the questions it raised regarding defining *obscenity* demonstrate how difficult it can be for a prosecutor to prove beyond a reasonable doubt that the defendant acted "knowingly," their visual depictions are considered "lewd," and whether those depictions are considered "obscene."[188]

Redefining the scienter requirement is essential because the majority in *Stevens* emphasized the lack of "prurient" conduct that was actually depicted

181. *See* 18 U.S.C.A. § 48 (2019); *Stevens*, 559 U.S. at 462.

182. Cash, *supra* note 151, at 804–805.

183. *See generally* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 79 (1973) (Brennan, J., dissenting) ("Yet our efforts to implement that approach demonstrate that agreement on the existence of something called 'obscenity' is still a long and painful step from agreement on a workable definition of the term.").

184. *See generally Strickland*, 560 F.3d at 446.

185. *Ferber*, 458 U.S. at 758; *but cf. Miller*, 413 U.S. at 24 (Determining what is "obscene" by means of a three-prong test, which consist of "applying contemporary local community standards, on the whole, appeals to the prurient interest; is patently offensive; and on the whole, lacks serious literary, artistic, political or scientific value.").

186. Cash, *supra* note 151, at 818.

187. *Id.*

188. *Id.* at 817.

in crush videos. It is important to note the distinction between depictions of extreme animal cruelty from the facts of many child pornography cases, which requires the Court to instead evaluate a visual depiction for lewdness.[189] This distinction between the subject matter of animal cruelty and human pornography presents the greatest challenge of adding a "prurient intent" element to the statute's scienter requirement. Even attempting to define obscenity in the context of animal cruelty poses a similar challenge because the *Miller* standard of obscenity defined above. Recall that *Miller* requires not only that the work depicted appeals to prurient interests and lacks redeeming value, but also that the work depicts sexual conduct.[190]

Next, it is important to examine case law that concerns the mental state of the actor to determine if they should be rightfully charged with a crime under statute. The Supreme Court has more liberally interpreted the meaning of "lewd or lascivious" in statutes where the language has been challenged as being "too broad." Cases after *Miller* devised a multi-factor test for a trier of fact to determine if a visual depiction of a nude minor meets the "lascivious" standard. One such federal case in California, *U.S. v. Dost* evaluated the multifactor test and determined that a trier of fact should need only find that at least one factor is met in order to find that the depiction is "lascivious."

Shortly after *Dost*, the Court in *U.S. v. Wiegand* shifted the onus from what was considered sexual conduct from the innocent minor depicted to the photographer (or videographer). In that case the Court held that "lasciviousness is not a characteristic of the child photographed but of the exhibition" and that "[the photograph] was a lascivious exhibition because the photographer arrayed it to suit *his* particular *lust*."[191] Two years later, in *U.S. v. Wolf*, the Tenth Circuit interpreted the *Dost* factors and held that there was no required amount needed to prove sexual exploitation in a photograph.[192] Useful application of the singular final *Dost* factor which states "whether the visual depiction is intended or designed to elicit a sexual response in the view" would require a court to acknowledge that the depiction of crush videos does not contain nudity, but exactly how such a connection between two types of obscenity should be made is a topic for future discussion.

If adding a prurient intent element is to improve the success of 18 U.S.C. § 48, a court must interpret a defendant-actor's intent. In 2000, a

189. *See generally* United States v. Nemuras, 567 F. Supp. 87 (D. Md. 1983) (the court had to determine whether certain photographs constituted a "lewd exhibition of the genitals").

190. *Miller*, 413 U.S. at 15.

191. United States v. Wiegand, 812 F.2d 1239, 1244 (9th Cir. 1987).

192. United States v. Wolf, 890 F.2d 241, 246 (10th Cir. 1989).

New Jersey court convicted defendants of throwing away a barrel of chickens that inadvertently contained some still alive in *State of New Jersey v. ISE Farms, Inc*.[193] On appeal, the Superior Court overturned the judgment on the basis that the defendants did not violate the law "knowingly," stating that the New Jersey statute did not sufficiently state the requisite mental state.[194] Unlike the lower court's reasoning, the Superior Court's analysis of the statute highlighted the lacking *intent* of the defendants. Where the negligence of the defendant did not equate to recklessness, the defendants could not be held liable for animal cruelty.[195]

D. Proving How Adding an Enhanced "Prurient Intent" Requirement in 18 U.S.C. § 48 Would Make It Constitutionally Stronger

In *Brockett v. Spokane Arcades*, the Supreme Court considered whether the language of "prurient interest" passed overbreadth.[196] In that case, a Washington moral nuisance statute attempted to prohibit material specifically "appealing to a prurient interest," which was defined as "inciting lasciviousness or lust."[197] The Ninth Circuit in that case viewed the *entire* statute as overbroad because the definition encompassed "lust," or a normal interest in sex. The Court condemned complete invalidity and was satisfied that statute was constitutional *except* to the extent that the statute punished legal conduct.[198] The Court in its reasoning referred to the definition of prurient interest devised in *Roth v. United States* where "prurient interest" may be constitutionally defined for obscenity purposes as that which appeals to a shameful or morbid interest in sex.[199] Essentially, if language that defines "prurient interest" was to be added to an amended version of 18 U.S.C. § 48 the Supreme Court would be unable to strike down the entirety of the statute on that basis as it did in *Stevens*.

193. State of New Jersey v. ISE Farms, Inc. Transcript of Sup. Ct. Warren Co., (Mar. 8, 2001).

194. State of New Jersey v. ISE Farms, Inc., Appeal No. A-45-00 (N.J. Sup. Ct., Law Div. Mar. 8, 2001); *see also* David J. Wolfson and Mariann Sullivan, *Foxes in the Hen House: Animals, Agribusiness, and the Law: A Modern American Fable*, in CASS R. SUNSTEIN AND MARTHA C. NUSSBAUM, EDS., ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 205, 207–208 (Oxford 2004).

195. *Id.*

196. Brockett v. Spokane Arcades, 472 U.S. 491.

197. *Id.* (citing Missouri v. Becker, 364 Mo. 1079 (1954)).

198. *Id.* at 504–505.

199. *Id.* at 505.

As mentioned in Section C, simply adding statutory exceptions in a statute or requesting the Court limit application of a statute after-the-fact may not dissuade a particularly adamant individual from finding novel ways to work around the statute's exceptions to find legal loopholes by classifying their depiction under "hunting" or "educational purposes." This means that, in another example, if someone pays workers in factory farms to film the crushing of animals considered to be a common practice exemption to cruelty, the act of selling those depictions later could be exempt from the current statute because doing so would easily fall under an exception. For this reason, an enhanced scienter requirement could make it easier for prosecutors to determine if appropriate level of mental state to find conduct liable as animal cruelty. Another example of this could be adding language that highlights conduct must be taken as a whole to meet a "prurient interest" test in order for it to satisfy the "*obscene*" element of 18 U.S.C. § 48 (f)(2)(B).

If a "prurient intent" scienter requirement based on standards similar to child pornography case law discussed above is added, it would require a trier of fact to apply a "totality of circumstances" approach to infer the intent of the producer.[200] This "totality of the circumstances" approach would also function better than a standard scienter element because it would require the use of circumstantial evidence to better assess whether the purpose of recording an intentional killing was done to inflict pain for prurient gratification to serve a justifiable legal means.

One strong example of a criminal statute with such a "prurient intent" element is Maryland Criminal Law Code § 3-902, which prohibits the "video surveillance of another in a private place with a prurient intent" and requires the State to satisfy the burden of proof by providing circumstantial evidence of such intent.[201] The statute clarifies that video surveillance done intentionally but without a *prurient* intent is only actionable under tort law as an unreasonable intrusion upon seclusion.[202] In this case, the prurient intent was demonstrated in the form of admissible evidence surrounding the crime such as prior similar acts and internet search history. This was seen in *Bickford v. State,* where the Court admitted evidence of a defendant's Internet history that was probative of prurient intent despite the defendant's objection that such evidence was highly prejudicial.[203]

200. *Id.*

201. Md. Code Ann., Crim. Law § 3-902.

202. *Id.*

203. Bickford v. State, No. 95, 2018 Md. App. LEXIS 471, at 23 (App. May 15, 2018). *See also* State v. Kula, 908 N.W.2d 539 (Iowa Ct. App. 2017) ("[t]he State appears to have carefully restricted its evidence so as to offer only that information necessary to prove […]

In order to charge a defendant for a crime that requires knowledge of intent, it is germane to closely scrutinize circumstantial evidence related to the motive of the depicter of animal crush videos.[204] Proper use of circumstantial evidence is important in child pornography cases where a possessor or depicter of material may lack the same prurient intent as another individual who would use it for their sexual gratification. Measuring the subjective prurient intent of a defendant is similarly important as applied to anti-animal cruelty depictions because a depicter may not be motivated to sell their depiction to others for sexual titillation purposes.[205] The Supreme Court has held the government is not required to present expert testimony to prove obscenity,[206] but the Second Circuit in *United States v. Petrov* clarified that in instances where the sexual nature of the obscene material is not immediately apparent, expert testimony may be used to show how the material appeals to the prurient interests of deviant segments of society.[207] *Petrov* established that the government must identify the deviant group, it must establish that the material appeals to the group's prurient interests.[208] This was similarly at issue in *United States v. Ragsdale* where the Court of Appeals for the Fifth Circuit held that the government did not need to prove that a jury was qualified to determine if videotapes sold by defendants offended local standards.[209] The reasoning by the court in *Ragsdale* demonstrates that a government proving the guilt an individual found violating 18 U.S.C.§ 48 for depicting animal crush videos would not need the use of expert testimony, making the case for prosecution easier.

The following statute contains a "prurient intent" element as one example legislators may take into consideration in revising 18 U.S.C. § 48. Maryland Criminal Law Code § 3-902 criminalizes "video surveillance of another in a private place with a *prurient* intent" and requires the State to provide evidence of such intent.[210] The statute clarifies that video surveillance done intentionally but without a *prurient* intent is only

that he did these acts intentionally rather than accidentally, and that he acted with the intent to satisfy his own sexual desires or those of another").

204. *See* Commonwealth v. Davidson, 595 Pa. 1, 43 (2007).

205. *Id.*

206. *See* Kaplan v. California, 413 U.S. 115, 121 (1973).

207. *See* United States v. Petrov, 747 F.2d 824, 830 (2d Cir. 1984).

208. *Id*.

209. *See* United States v. Ragsdale, 426 F.3d 765, 785 (5th Cir. 2005).

210. *See* Md. Code Ann., Crim. Law § 3-902; *see also* State v. Kula, 908 N.W.2d 539 (Iowa Ct. App. 2017) ("The State appears to have carefully restricted its evidence so as to offer only that information necessary to prove […] that he did these acts intentionally rather than accidentally, and that he acted with the intent to satisfy his own sexual desires or those of another.").

actionable under tort law as an unreasonable intrusion upon seclusion.[211] The statute provides the criminal scope of the statute is limited only to individuals with prurient intent.[212] Such an element of prurient intent could be adapted under the section (b) "Extraterritorial application" of 18 U.S.C. § 48 section (b) to read:

> (1) Creation of animal crush videos.
>
> "–It shall be unlawful for any person, with [*prurient intent*], to knowingly create or procure any depiction of animal crushing featuring the infliction of bodily injury, death, or torture on an animal."
>
> (1) …
>
> [*(A) The person engaging in such conduct intends or has reason to know that the animal crush video will derive sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person.*][213]

or, similarly, within section (f) "Definitions" as:

> (4) "*Prurient Intent" is defined as the intent to arouse, appeal to, or gratify the sexual desire of any person.*[214]

Therefore, the central argument of this article posits that implementing a prurient intent requirement into 18 U.S.C. § 48 would provide the federal government with interpretation tools necessary to differentiate between depictions of animals in pain made with the deliberate intent to cause unwarranted suffering without intrinsic purpose. Using already-existing statutes for reference, as shown above, the value of inserting a specific prurient intent element would make it much clearer for courts to understand how to interpret the intent of an individual. Thus, targeting specific conduct that "appealing to sexual interests" through an enhanced scienter

211. *Id*.

212. *See* Harleysville Preferred Ins. Co. v. Rams Head Savage Mill, LLC, 237 Md. App. 705.

213. *See* Cal. Evid. Code §1108 (defining "sexual offense" as "*[d]eriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person*).

214. *Cf.* 18 U.S.C.S. § 920(g)(2) ("sexual contact" defined as "touching … with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person …").

requirement would work to eliminate the chance of wrongfully convicting individuals for their depictions.

Enhancing the statutory framework of 18 U.S.C. § 48 has the potential to overcome some of the First Amendment challenges seen in *Stevens*, *Richards*, and *Justice*. The above sections have demonstrated the use of scienter requirements in criminal statutes as one means to resolve the First Amendment challenges seen in those three cases. Finally, other criminal statutes have demonstrated how a prurient intent element would be used to resolve the statutory overbreadth problem to be more precisely prosecute individuals who continue to participate in the production of animal crush videos.

V. Substituting Incarceration with Non-Penal, Therapeutic Solutions for Offenders of 18 U.S.C. § 48 and Beyond

Rehabilitation functions as one of four goals (along with retribution, deterrence, and incapacitation) historically viewed by criminal scholars as justification for imposing criminal sentences. Rehabilitation, put plainly, seeks to modify offender's behavior so they will not continue to commit crime in the future.[215] Until the final quarter of the twentieth century, the rehabilitative model of sentencing was viewed as the primary means to justify incarceration.[216] By the 1980s, rehabilitation had been abandoned for a punishment-driven approach to sentencing that replaced the rehabilitation model in most jurisdictions.[217]

It is undeniable that efforts to rehabilitate offenders of 18 U.S.C. § 48, or any animal abuse statute for that matter, have been largely secondary to the aggressive prosecution tactics aimed at targeting animal abusers. Today, there is growing consensus that the outcomes of strict prosecution of those guilty of animal abuse is misleading and overstated.[218] An increasing number of animal rights advocates are criticizing the role of incarceration as "not the unmitigated good for society" that it was thought to be a generation ago.[219] For example, the litigation approach used to target animal abuse in factory farms has resulted in overwhelmingly prosecuting low-income, people of color, many of whom are deported because of uncertain

215. DORIS L. MACKENZIE, SENTENCING AND CORRECTIONS IN THE 21ST CENTURY: SETTING THE STAGE FOR THE FUTURE 1 (2000).

216. Robert G. Lawson, *Difficult Times in Kentucky Corrections-Aftershocks of a "Tough on Crime" Philosophy*, 93 KY. L.J. 305, 312 (2005).

217. *Id.* at 316.

218. JUSTIN MARCEAU, BEYOND CAGES: ANIMAL LAW AND CRIMINAL PUNISHMENT (2019).

219. *Id.* at 255.

immigration status.[220] Again others in the animal protection movement argue that criminal intervention is necessary to prosecute harshly to put an animal abuser on the radar of law enforcement and prevent future violence.[221] In reality, there is little data to support the notion that convictions alone are sufficient interventions for protecting animals and even humans from future harm.[222] Further, while there exist animal cruelty laws in all fifty states, there has been no push to implement mandatory treatment or reporting, which does not exist in a single state.[223] An emerging body of research in effective counseling and interventions for animal cruelty includes treatment plans that include animal-assisted therapy to provide a way for an animal abuser to reintegrate into society and develop empathy.[224] Given that psychologists have recognized many offenders of wanton animal abuse suffer from psychological disorders, penalizing an individual by locking them away in jail acts as a denial of treatment and imposes additional stressors.

Regardless of how 18 U.S.C. § 48 is interpreted in the future, courts will need to recognize that the appropriate treatment of offenders is far more important than incarceration, which tends to increase future criminality. While punishment retains some embodiment of a necessary evil, increasing incarceration is unlikely to ensure the protection of animals and mental health of their human counterparts.[225] Current legislation that heightens an animal abuse crime from a misdemeanor to a felony increasing the number of incarcerable years will accomplish little without data-based treatment procedures that are uniformly and consistently applied. Future scholarship on this issue must focus on not only how to better *identify* actual animal abusers, as much of this Article does, but also how courts can better implement mandatory and practical treatment instead of mandatory prison terms to circumvent the underlying abusive behavior.

220. *Id.* at 251.

221. *Id.* at 256.

222. *Id.* at 257.

223. *Id.* at 247.

224. *Id.* at 246, (*citing* Llian Alys et al., *Developmental Animal Cruelty and Its Correlates in Sexual Homicide Offenders and Sex Offenders*, *in* THE LINK BETWEEN ANIMAL VIOLENCE AND HUMAN VIOLENCE (Andrew Linzey ed. 2009)).

225. MARCEAU, *supra* at note 208, at 283.

VI. Conclusion

A growing body of research indicates the psychological harm suffered by those who engage in wanton animal cruelty for the purposes of causing pain.[226] Such research has shown that legitimizing the access to video depictions by nonenforcement is likely to lead vulnerable individuals to commit acts of criminal cruelty.[227] As stated above, this warrants further legislative action into finding novel treatments courts can impose on or those who produce animal crush content to avoid future recidivism and overcriminalization.

There is also an undeniably compelling need to address the profiting aspect of committing *untraceable* illegal acts of animal cruelty. If regulating the trade of crush videos cannot be regulated as commercial speech, legislators must work diligently to add an enhanced prurience-based scienter requirement which will preempt any attempts at veiling conduct as having any entertainment value, such as hunting or documentary.

Anti-animal cruelty legislation seeks to prevent the deliberate or willful mistreatment of animals by imposing criminal sanctions for jeopardizing animal welfare.[228] Criminalizing *any* depiction of blatant animal abuse is a necessity to uphold nonhuman animal rights. As the article has discussed, doing so is easier said than done. Case law emerging from 18 U.S.C. § 48 has been unfavorable in preventing depictions of animal cruelty because Section 48 has proven to be constitutionally weak, and thus subject to invalidation. One course of action around the Court's reluctance to create new categories of unprotected speech in this area would be the addition of a "prurient intent" element to the statute.

Therefore, until the Court recognizes depictions of animal abuse as a novel unprotected category of speech, purveyors of animal crush videos will continue to make legal profits at the expense of animal lives. This article has argued one workable solution, which is that 18 U.S.C. § 48 must be finely tuned elsewhere—likely with a prurient intent element that targets the mens rea of the offender. Such an element presents a less restrictive, content-neutral option than wholly banning distributing depictions of wanton animal cruelty.

226. Meredith Shafer, *Perplexing Precedent: United States v. Stevens Confounds a Century of Supreme Court Conventionalism and Redefines the Limits of "Entertainment"*, 19 VILL. SPORTS & ENT. L.J. 281, 286–287 (2012).

227. Michael Reynolds, Note, *Depictions of the Pig Roast: Restricting Violent Speech Without Burning the House*, 82 S. CAL. L. REV. 341, 343 (2009).

228. Jessica Vapnek and Megan Chapman, *Legislative and regulatory options for animal welfare*, FAO LEGISLATIVE STUDY, 2011, http://www.fao.org/3/i1907e/i1907e00.pdf.

It is imperative that the legislature addresses the constitutional weaknesses of 18 U.S.C. § 48 and attempts to draft a more precise version. The longer the statute takes to be redrafted, the more likely offenders will continue heinous acts of depicting abuse and escape prosecution. Until then, animal crushing for broadcast entertainment will remain legal.[229] As the nether corners of the Internet continue to elude the purview of state law, federal statutory enforcement must step up and restrict depictions for sexual or gratification purposes.

229. Networks such as the Discovery Channel are notorious for broadcasting the killing and crushing of animals for airing on survival shows such as "*Man vs. Wild."* Michael Mountain, *Discovery Channel's Crush Videos*, ALL CREATURES (Oct. 2010), https://www.all-creatures.org/articles/ar-channel.html.