WHEN BAD THINGS HAPPEN TO GOOD LAWS: THE RISE, FALL, AND FUTURE OF SECTION 48

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CONTENTS

Introduction 470
Act One: Behind the Scenes 472
A. The Statute 472
B. The Facts 473
Act Two: Taking Center Stage 477
A. The Decision 477
B. The Dissent 478
Act Three: That's a Wrap 479
A. Section 48 Should Have Been Upheld Because Depictions of Animal Cruelty Do Not Warrant First Amendment Protection .. 479
1. Section 48 Regulated Conduct, Not Speech 479
2. History and Overview of Freedom of Speech 480
a. The depictions of animal cruelty that Section 48 targeted constitute low value violent speech, and thus should not warrant First Amendment Protection. 484
b. The depictions of animal cruelty that Section 48 targeted constitute obscenity, and thus do not warrant First Amendment protection 485

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c. The depictions of animal cruelty that Section 48 targeted constitute incitement, and thus do not warrant First Amendment protection 490
3. Depictions of Animal Cruelty Constitute Unprotected Speech under the *Ferber* Approach...... 492
a. Preventing animal cruelty constitutes a compelling government interest 494
i. The Court Has Never Held that Preventing Cruelty to Animals Fails to Constitute a Compelling government Interest 495
ii. Nationwide Consensus 497
iii. Enhanced Prevention and Detection of Animal Cruelty 501
iv. Prevention of Emotional Harm to Humans 504
v. Decreased Risk of Desensitization to Violence and Exposure to Innocents 504
vi. Prevention of Violent Crimes against Humans 506
vii. Enhanced Detection and Prevention of Domestic Violence 511
viii. Enhanced Detection and Prevention of Child Abuse 515
b. Depictions of animal cruelty are "intrinsically related" to underlying crimes 519
c. Advertising and selling the speech provides an economic motive for and are thus integral to its production 524
d. The possibility that Section 48 prohibits socially valuable speech is "exceedingly modest, if not, de minimus" 527
e. Banning depictions of animal cruelty comports with First Amendment jurisprudence...... 530
f. In determining whether Section 48 satisfies the *Ferber* factors, the proper comparison is between depictions of child pornography and depictions of animal cruelty, not between children and animals 531
Act Four: The Final Cut 533
A. The Impact of *U.S. v. Stevens* 533
B. Legislative Responses to *U.S. v. Stevens* 534
1. Initial Reactions...... 534
a. The Crush Act: Section 48, New but Improved? 536
C. State Measures 546
Conclusion...... 548

INTRODUCTION

The movie begins. Hypnotic music plays eerily in the background. A woman saunters out of the shadows carrying a puppy by the scruff of its

neck. Her face and upper body are obscured, so the viewer's eyes are drawn down her body to her spiked heels. The puppy begins to whimper and squirm as the actress tapes its writhing body to the floor. The music fades, and the woman's shrill voice breaks the silence. She screams threats and profanity at the terrified puppy as it twists, pulls, and kicks, trying desperately to escape. But fighting is futile because the puppy is pinned to the floor, and the true horror has yet to begin. The actress cruelly kicks the animal again and again, each time with increasing force. Blood spurts from the puppy's bleeding eyes and nose. Its piercing screams compete with the woman's increasingly abusive epithets, which never subside. Fighting through the pain, the dying puppy struggles to escape as the woman's stiletto heels grind every bone in its body into blood-spattered dust and wrench the puppy's limbs one by one from its convulsing body. The sound of crushing bones mixes with the puppy's high-pitched shrieks of pain to create a tortured symphony of sound. After a slow and unimaginably tortuous death, the puppy, slaughtered beyond recognition, lies in pieces scattered on the bloodstained floor. Still not sated, the woman stomps the corpse. Then a silence as still as shadow permeates the air. The movie ends.

And somewhere hidden in the shadows sits an aroused viewer with perverse sexual tastes who wonders what victim will be featured in the next crush video he "custom orders" -- a kitten, a hamster, an infant? For a thrill like this, he will pay almost anything; and with nothing to stop his greedy suppliers, he knows that they will kill to make his twisted fantasies come true.

The scenario above may seem as if it were ripped from the pages of a horror novel, but regrettably, it is rooted in fact, not fiction. Recognizing the tremendous societal harms caused by depictions of animal cruelty, Congress enacted 18 U.S.C. § 48 ("Section 48") -- a federal law criminalizing the creation, sale, or possession of certain depictions of animal cruelty.[1] Congress intended Section 48 to end the creation and trafficking of depictions of animal cruelty in which innocent animals are brutally tortured for entertainment's sake. Proponents of Section 48 predicted that countless benefits to both humans and animals would flow from its enforcement.

To the dismay of animal rights advocates, law enforcement officials, and other Section 48 supporters nationwide, on April 20, 2010, the United States Supreme Court ("the Court") affirmed the decision of the United States Court of Appeals for the Third Circuit ("Third Circuit"),

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[1] As used herein, the phrases "cruelty to animals" and "animal cruelty" refer only to *criminal* animal cruelty. Unless otherwise specified, the phrase "depictions of animal cruelty" refers to portrayals of criminal acts of cruelty against live animals.

declaring Section 48 to be unconstitutional. On December 9, 2010, President Barack Obama signed the Animal Crush Video Prohibition Act of 2010 ("Crush Act") into law. Will the Crush Act be enough to stamp out the evil practices driving this clandestine industry, or will it, too, succumb to legal challenges?

This Article explains Section 48's scope and outlines the key facts underlying the case that resulted in its invalidation. Next, it analyzes the Court's decision and explores why Section 48 could and perhaps should have been upheld. Finally, the Article critiques the newly enacted Crush Act, offering recommendations to increase its effectiveness and reduce its susceptibility to invalidation.

ACT ONE: BEHIND THE SCENES

A. THE STATUTE

In response to growing concern regarding the crush video industry, Representative Elton Gallegly of California sponsored Section 48.[2] After a rigorous legislative debate, the bill overwhelmingly passed on October 19, 1999, receiving 372 ayes and only 42 nays.[3] Proponents of Section 48 alluded to the link between human and animal violence, the impact of depictions of animal cruelty on viewers, especially children, and the need to make a moral statement that wanton acts of extreme animal cruelty are intolerable in America.[4] Opponents of Section 48 argued, *inter alia*, that Section 48 was not sufficiently narrowly tailored and that preventing animal cruelty is not a compelling interest.[5]

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[2] Kerry Adams, Note, *Punishing Depictions of Animal Cruelty: Unconstitutional or a Valid Restriction on Speech*?, 12 BARRY L. REV. 203, 206 (2009).

[3] *Id*. at 206–07; *see* RANDALL LOCKWOOD, AMERICAN PROSECUTORS RESEARCH INSTITUTE, ANIMAL CRUELTY PROSECUTION: OPPORTUNITIES FOR EARLY RESPONSE TO CRIME AND INTERPERSONAL VIOLENCE 32–33 (2006); Michael Reynolds, Note, *Depictions of the Pig Roast: Restricting Violent Speech Without Burning the House*, 82 S. CAL. L. REV. 341, 344 (2009).

[4] Adams, *supra* note 2, at 206.

[5] *Id*. at 206–07; 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, 183 (2009) ("In Congress, opponents of the bill argued that although people may find depictions of the intentional maiming, mutilating, wounding, or killing of animals 'disturbing,' the fact that society finds particular speech offensive is not a sufficient reason to suppress it. Opponents also raised constitutional concerns. They argued that the depictions could not be categorized as obscene under the obscenity exception to the First Amendment. They also asserted that there was no compelling interest and, even if there were, the bill was not narrowly tailored.") (internal citations omitted).

On December 3, 1999, former President Clinton signed Section 48 into law.[6] Section 48 stated in pertinent part:

> Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both. . . . Subsection (a) does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.[7]

Subsection (c)(1) defined the term "depiction of animal cruelty" as:

> any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State.[8]

Subsection (c)(2) defined "state" as: "each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any other commonwealth, territory, or possession of the United States."[9]

B. The Facts

Ironically, the first prosecution under Section 48 that proceeded to trial ultimately resulted in the law's invalidation.[10] Through his business -- "Dogs of Velvet and Steel" -- and website -- Pitbulllife.com -- Robert J. Stevens allegedly sold dog-fighting videos and paraphernalia, which he advertised via *Sporting Dog Journal*[11] -- an underground periodical

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[6] Adams, *supra* note 2, at 204.
[7] 18 U.S.C. § 48 (2009).
[8] 18 U.S.C. § 48 (2009).
[9] *Id.*
[10] Reynolds, *supra* note 3, at 345–46.
[11] Joe Mandak, *Men Charged in Publication of Dogfighting Magazine*, ASSOCIATED PRESS, July 26, 2004 (Owner of Sporting Dog Journal James Jay Fricchione and John Kelly were charged with animal cruelty and conspiracy to commit animal cruelty -- felonies warranting fines up to $15,000 and seven years in prison. The magazine purportedly serves a sizeable international

that purportedly promotes the criminal dog-fighting industry by publishing the results of illegal dogfights. [12]

Law enforcement agents mail-ordered three videos from Stevens.[13] Two of the tapes --"Pick-A-Winna" and "Japan Pit Fights" -- portrayed organized dogfights.[14] The third video --"Catch Dogs" -- depicted a pit bull tearing off the lower jaw of a domestic pig.[15] Law enforcement agents obtained a warrant and searched Stevens' residence where they found dog-fighting videos, merchandise, and records indicating sales in excess of $50,000.[16]

Stevens was indicted on three counts of knowingly selling depictions of animal cruelty with the intent to place the depictions in interstate commerce for profit in violation of Section 48.[17] He moved to dismiss his indictment by arguing that Section 48 was void for vagueness under the Due Process Clause of the Fifth Amendment and facially invalid under the Free Speech Clause of the First Amendment.[18] In denying his

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audience of subscribers. According to Pennsylvania Attorney General, Jerry Pappert, the bimonthly circular published information on dog-fights, stud services, and dog-fighting paraphernalia. The magazine also conferred champion and grand champion status on winning dogs.).

[12] Brief for Appellant at 6, United States v. Stevens, 533 F.3d 218 (3d Cir. 2008) (No. 05-2497) [hereinafter Brief of Appellant].

[13] Brief for the United States at 4, United States v. Stevens, 533 F.3d 218 (3d Cir. 2008) (No. 08-769) [hereinafter Gov't Brief].

[14] *Stevens*, 533 F.3d at 221; Brief of Appellant, *supra* note 12, at 6–7.

[15] *Stevens*, 533 F.3d at 221*; see* Elizabeth L. Kinsella, Note, *A Crushing Blow:* United States v. Stevens *and the Freedom to Profit from Animal Cruelty*, 43 U.C. DAVIS L. REV. 347, 369 (2009) (While creators of depictions of animal cruelty typically edit out identifying information in animal cruelty videos so as to prevent prosecution arising from the underlying acts of animal cruelty caught on tape, "Catch Dogs" "contained names and addresses of dog suppliers, locations of hunts, and clear images of participants' faces. The State could prosecute offenders for the underlying acts of animal cruelty without banning the depictions of that crime.").

[16] Brief Amicus Curiae of International Society for Animal Rights in Support of Petitioner at 9, United States v. Stevens, 533 F. 3d 218 (3d Cir. 2008) (No. 08-769) [hereinafter ISAR Brief]; Gov't Brief, *supra* note 13, at 4.

[17] Brief of Appellant, *supra* note 12, at 5; Gov't Brief, *supra* note 13, at 4; Kinsella, *supra* note 15, at 366.

[18] Brief of Appellant, *supra* note 12, at 26; Gov't Brief, *supra* note 13, at 4. Advanced Consulting and Marketing, Inc., a group that broadcasts cockfighting matches on the Internet, also challenged Section 48 in the Southern District of Florida, but a discussion of that litigation exceeds the scope of this article. *See* Adams, *supra* note 2, at 203–04; Will Connaghan, *Constitution Shields Questionable Entertainment*, ST. LOUIS DAILY REC., July 18, 2007 ("Last week, a Florida company that broadcasts Puerto Rican cockfights over the Internet filed suit in Miami federal court to challenge [Section 48] . . . .").

motion, the district court held that the gruesome depictions of animal cruelty that Section 48 targeted do not constitute protected speech.[19]

In reaching its decision, the district court drew a comparison to pornography and explained that "if the government has a sufficiently compelling interest in prohibiting the sale of depictions of sexual activity between consenting adults, it has an equal, if not greater, interest in preventing the torture, maiming, mutilation, and wanton killing of animals who are not able consent to such treatment."[20] It also analogized Section 48 to a similar law prohibiting child pornography that had been upheld in *New York v. Ferber*[21] ("*Ferber* Approach") and determined that Section 48 was not substantially overbroad because it applied only to depictions of intentional and illegal acts of animal cruelty to live animals with the intention of placing the depictions in interstate commerce for profit and where the depictions lack redeeming social value.[22]

A jury convicted Stevens, and he was sentenced to concurrent prison sentences of thirty-seven months apiece, followed by three years of supervised release.[23] However, on July 18, 2008, the en banc Third Circuit, over a three judge dissent, vacated Stevens' conviction and declared Section 48 to be facially unconstitutional.[24] In reaching its decision, the Third Circuit expressed unwillingness to hold that the animal cruelty depictions at issue constitute unprotected speech absent guidance from the Court.[25] The Third Circuit rejected the district court's analogy to *Ferber* and relied instead on the Court's holding in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* ("*Lukumi*"),[26] which the

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[19] Brief of Appellant, *supra* note 12, at 30; Gov't Brief, *supra* note 13, at 4.
[20] Gov't Brief, *supra* note 13, at 5.
[21] *Id.*
[22] *Id.*
[23] *Id.* at 2; Kinsella, *supra* note 15, at 366.
[24] United States v. Stevens, 130 S. Ct. 1577, 1583 (2010); Gov't Brief, *supra* note 13, at 5–6.
[25] *Stevens*, 130 S. Ct. at 1583–84; Gov't Brief, *supra* note 13, at 5–6; Kinsella, *supra* note 15, at 366.
[26] *Stevens*, 130 S. Ct. at 1583–84; Gov't Brief, *supra* note 13, at 6 (discussing Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah, 508 U.S. 520, 547 (1993)); Kinsella, *supra* note 15, at 366–67 ("In facially invalidating the statute, the Third Circuit declined to recognize a new category of unprotected speech without express direction from the Supreme Court. Out of the traditionally unprotected categories, the court found the speech regulated by § 48 somewhat similar only to Ferber. Addressing the five Ferber factors favoring creation of a new category of unprotected speech, the Stevens court rejected a government argument that depictions of animal cruelty were analogous to depictions of child pornography. Having determined that § 48 was a content-based regulation of protected speech, the Stevens court applied strict scrutiny review. It held the statute failed this heightened standard of review for two reasons. First, the

Third Circuit interpreted to mean that preventing animal cruelty is not a compelling interest.[27] Although the Third Circuit opined in a footnote that Section 48 may be overbroad, it rested its holding on strict scrutiny grounds since "voiding a statute on overbreadth grounds is 'strong medicine.'"[28]

Three judges dissented[29] on the ground that the videos at issue were not entitled to First Amendment protection in part because they lack redeeming social value but also because the extensive history and breadth of American anti-cruelty laws indisputably indicate that preventing animal cruelty is an important government interest.[30] The dissenters further opined that animal cruelty erodes public mores and has a "deleterious effect on the individual inflicting the harm."[31] Analogizing to *Ferber*, the dissenters averred that prohibiting depictions of animal cruelty would dry up the lucrative dog-fighting industry.[32] The dissenters further concluded that Section 48 was neither overbroad nor impermissibly vague[33] and that constitutional concerns regarding the statute should be addressed on a case-by-case basis.[34]

On December 15, 2008, the United States ("United States" or "Government") filed a petition for writ of certiorari, which the Court

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regulation served no compelling interest. The court found preventing animal cruelty was not a sufficiently compelling interest in the context of free speech to justify a content-based regulation. Second, even assuming the asserted interest was compelling, the statute failed to satisfy the narrow tailoring requirement. In sum, because § 48 was unconstitutional, Stevens's conviction could not stand.").

[27] *See* Gov't Brief, *supra* note 13, at 6; Kinsella, *supra* note 15, at 372 (The en banc Third Circuit "erroneously suggested that there is no compelling government interest in preventing animal cruelty in the First Amendment context.").

[28] Gov't Brief, *supra* note 13, at 6 (quoting Broadrick v.Oklahoma, 413 U.S. 601, 613 (1973)).

[29] Kinsella, *supra* note 15, at 367.

[30] *See* Gov't Brief, *supra* note 13, at 6–7; Kinsella, *supra* note 15, at 367 ("Detailing the long-standing history of animal cruelty laws in the United States, these judges agreed with the government that its interest in protecting animals was compelling. The dissenting circuit judges further argued that the depictions prohibited under § 48 were of such minimal social value as to fall outside of First Amendment protection. Applying the Ferber factors, these judges would have recognized depictions of animal cruelty as a narrow category of unprotected speech, and thus would have upheld both the constitutionality of § 48 and Stevens's conviction.").

[31] Gov't Brief, *supra* note 13, at 7.

[32] *Id.*

[33] *Id.*

[34] *Id.*

granted on April 20, 2009.[35] The Court heard oral argument on October 6, 2009. On April 20, 2010, the Court declared Section 48 to be unconstitutionally overbroad.

ACT TWO: TAKING CENTER STAGE

A. THE DECISION

Writing for the eight member majority ("Majority"), Chief Justice John Roberts noted that as a content-based regulation, Section 48 is presumptively invalid, and the United States did not successfully rebut that presumption.[36] Although the Majority conceded that restricting certain categories of speech, including fraud, incitement and defamation, is consistent with the First Amendment, it emphasized that depictions of animal cruelty neither constitute a new category of unprotected speech nor fall into existing categories of unprotected speech in part because there is no evidence of a tradition of prohibiting such depictions as exists for criminalizing the underlying cruelty portrayed.[37]

After concluding that the videos at issue warranted First Amendment protection, the Majority determined that Section 48 was substantially overbroad.[38] A law may be invalidated as overbroad where a "substantial number" of its applications are unconstitutional "'judged in relation to the statute's plainly legitimate sweep.'"[39] The Majority concluded that Section 48 was overbroad because its definition of "depiction of animal cruelty" did not require the conduct portrayed to be cruel and included the terms "wounded" and "killed," which, according to the Majority, could reach a wide array of conduct not intended to come within its embrace.[40] In addition, because Section 48 applied to any depiction of conduct unlawful in the state where it was created, sold, or possessed, the Majority reasoned that depictions of legal conduct could violate the law if sold in another state where the same conduct was unlawful. As such, the Majority observed that Section 48 could apply to the sale of hunting depictions within the District of Columbia because hunting is banned therein and such depictions are not typically educational or

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[35] *Id.* at 1.
[36] United States v. Stevens, 130 S. Ct. 1577, 1584–86 (2010) (citation omitted).
[37] *Id*.
[38] *Id.* at 1588.
[39] *Id.* at 1597 (quoting United States v. Williams, 553 U.S. 285, 292 (2008)).
[40] *Id.*; Barbara Grzincic, *Commentary: It Takes a Rifle, Not a Shotgun, to Target Animal Cruelty Videos*, DAILY REC. (Baltimore, MD), Apr. 20, 2010 (During the oral argument, Justice Scalia asked, "How do you limit 'killed?!' . . . 'Kill' has one meaning, which is "kill!'").

instructional. The Majority further emphasized that Section 48 "draws no distinction based on the reason the conduct is made illegal."[41]

Although the Majority admitted that Section 48 borrowed the "serious value" language of *Miller v. California*, it clarified that "serious value" was not a general precondition that, standing alone, could save a statute and noted that the First Amendment protected much speech that lacked serious value but still fell within Section 48's embrace. According to the Majority, despite the Government's assertions to the contrary, Section 48's "exceptions clause simply had no adequate reading that could result in the statute banning only the depictions the Government aimed to ban."[42] Nor did the Government's assurance that it would only apply Section 48 to the narrow subset of depictions for which it was intended save the statute.[43] In striking down Section 48, however, the Court did not decide whether a narrowly tailored statute limited to crush videos or depictions of extreme animal cruelty would be constitutional.

B. The Dissent

In his lengthy dissent, Justice Samuel Alito ("Justice Alito") argued, *inter alia*, that the question presented was whether Section 48 was unconstitutional as applied to the facts of the case; according to Justice Alito, the Majority had unnecessarily and inappropriately resorted to the "'strong medicine' of the overbreadth doctrine -- that generally should be administered only as 'a last resort'"-- to declare Section 48 unconstitutional.[44] Justice Alito criticized the Majority's reliance on "fanciful hypotheticals" to find Section 48 overbroad.[45] He observed that "[w]hen a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting instruction;" [46] -- a doctrine that, according to Justice Alito, the Majority failed to follow when interpreting Section 48.[47] Justice Alito insisted that, despite the Majority's contentions to the contrary, portrayals of lawful hunting are beyond Section 48's embrace as clearly stated in legislative debate on the law;[48] such depictions would also fall within

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[41] *Stevens*, 130 S. Ct. at 1588.
[42] *Id.* at 1581.
[43] *Id.* at 1591–92.
[44] *Id.* at 1592–93.
[45] *Id*. at 1594.
[46] *Id.* at 1595 (quoting New York v. Ferber, 458 U.S. 747, 769 (1982).
[47] *Stevens*, 130 S. Ct. at 1594–96 (Alito, J., dissenting).
[48] *Id.* at 1596 (citing H.R. Rep. No. 106-397, p.8 (1999) ("[D]epictions of ordinary hunting and fishing activities do not fall within the scope of the statute."); *see, e.g.*, 145 Cong. Rec. 25894 (Oct. 19, 1999) (Rep. McCollum) ("[T]he sale of depictions of legal activities, such as hunting and fishing, would

Section 48's broad exceptions clause.[49] Justice Alito emphasized that "invalidation for overbreadth is appropriate only if the challenged statute suffers from substantial overbreadth -- judged not just in absolute terms, but in relation to the statute's 'plainly legitimate sweep.'"[50] Applying the *Ferber* Approach to depictions of animal cruelty, he determined that such depictions constitute unprotected speech.[51] He would have vacated the decision and ordered the Third Circuit to determine whether the dog-fighting videos at issue were constitutionally protected.[52]

ACT THREE: THAT'S A WRAP

A. SECTION 48 SHOULD HAVE BEEN UPHELD BECAUSE DEPICTIONS OF ANIMAL CRUELTY DO NOT WARRANT FIRST AMENDMENT PROTECTION

There are several strong arguments to support the conclusion that the Court could and perhaps should have upheld Section 48. First, some argue that Section 48 regulated conduct, not speech, so it did not implicate the First Amendment. Even assuming that Section 48 targeted speech, the Government and its *amici* argued that depictions of animal cruelty fall into existing categories of unprotected speech or the Court should have created a new category of unprotected speech to encompass such depictions.

1. Section 48 regulated conduct, not speech[53]

The First Amendment, which states in pertinent part, "Congress shall make no law . . . abridging the freedom of speech,"[54] aims to prevent governmental restrictions on what is "seen, spoken, read, or heard."[55] Conduct, standing alone, does *not* warrant First Amendment review.[56]

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not be illegal under this bill."); *id.* at 25895 (Rep. Smith) ("[L]et us be clear as to what this legislation will not do. It will in no way prohibit hunting, fishing, or wildlife videos.").

[49] *Stevens*, 130 S. Ct. at 1595.

[50] *Id.* at 1597 (citing United States v. Williams, 553 U.S. 285, 292 (2008)).

[51] *Id*. at 1598–602.

[52] *Id.* at 1593.

[53] As used herein to refer to depictions of animal cruelty that Section 48 prohibits, the use of the term "speech" does not concede that the material constitutes "speech" for purposes of the First Amendment.

[54] U.S. CONST. amend. I.

[55] Adams, *supra* note 2, at 207.

[56] ISAR Brief, *supra* note 16, at 12 (citing Acara v. Cloud Books, Inc., 478 U.S. 697, 708 (1986) (upholding a statute allowing closure of a building used for prostitution where it was deemed a public health nuisance) and Barnes v. Glen Theatre, Inc. 501 U.S. 560, 572 (1991) (upholding a ban on nude dancing) (Scalia, J., concurring)).

As the International Society of Animal Rights ("ISAR") has pointed out, Stevens' conviction arose from his attempted *sale* of depictions of animal cruelty.[57] It was that *conduct* that provoked his conviction. By selling depictions of illegal animal fighting, he made a handsome profit[58] and promoted the crime of dog-fighting.[59] According to ISAR, Stevens should not have been permitted to retrospectively label his profiteering conduct as "expression" to reverse his conviction and profit from his purported promotion of crime.

As ISAR observed, the Court is not required to "accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[60] However, the Majority failed to address the threshold question of whether Stevens' conduct contained sufficient expressive elements to implicate the First Amendment.[61] If not, then the sale was not entitled to First Amendment review.[62] For this reason, ISAR argued that the Third Circuit's decision could have been reversed without invalidating Section 48.

2. History and Overview of Freedom of Speech

While it is beyond dispute that freedom of speech is a right worth protecting, it is equally accepted that freedom of speech is not absolute.[63] The constitutionality of regulating protected speech hinges on the distinction between *content-based* and *content-neutral* restrictions.[64]

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[57] *Id.* at 14.
[58] *Id*.
[59] Brief of Amicus Curiae the American Society for the Prevention of Cruelty to Animals In Support of Petitioner at 9 (2009), United States v. Stevens, 533 F.3d 218 (2008) (No. 08-769) [hereinafter ASPCA Brief] ("[D]ogfighting videos, such as those for which Stevens was arrested, perpetuate animal cruelty by playing a central role in promoting the dogfighting enterprise.").
[60] ISAR Brief, *supra* note 16, at 16 (quoting Spence v. State of Washington, 418 U.S. 405, 409 (citing United States v. O'Brien, 391 U.S. 367 (1968)).
[61] *Id.* at 10–11.
[62] *Id.*
[63] ASPCA Brief, *supra* note 59, at 35; Adams, *supra* note 2, at 220 ("[T]he First Amendment has never been treated as an absolute.").
[64] Kinsella*, supra* note 15, at 355–57 ("Content-based regulations focus on the communicative impact of speech. In other words, they restrict communication because of the message expressed. The term 'content-based' subsumes two subcategories: restrictions on the subject matter of the speech, and restrictions on the viewpoint of the speaker. For example, a law prohibiting distribution of campaign literature within 100 feet of the entrance to a poll is content-based. The law is content-based because it applies to political campaign literature, a subject matter of speech, but would not apply to a concert handbill. Alternatively, a law barring Republican flyers but allowing Democratic flyers near the same poll is viewpoint-based. The law is viewpoint-based because it

Since content-neutral restrictions are less likely to chill unpopular speech, they warrant less judicial scrutiny. By contrast, content-based restrictions are presumptively invalid and warrant heightened scrutiny because they "implicate censorship."[65] To survive strict scrutiny, a content-based restriction must be narrowly tailored to achieve a compelling government interest.[66]

Some speech is categorically excluded from First Amendment protection. As the Court articulated in *Chaplinsky v. New Hampshire*:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting or 'fighting' words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[67]

In *Stevens*, the Majority rejected both the Government and the Third Circuit's approaches to determining whether depictions of animal cruelty constitute protected speech but failed to clarify what factors should be examined to make that determination. The Government urged the Court to balance "the governmental interest in restricting the speech against the value of the speech" in determining whether speech warrants First Amendment protection ("*Chaplinsky* Balancing Test" or "*Chaplinsky* Approach").[68] In rejecting that approach, the Majority stated that "[t]he First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits"[69] but admitted that the Government's "view did not emerge from a vacuum."[70] The Majority explained that *descriptions* of factors that make a category of speech unprotected do not give rise to a general test and then appeared to endorse the application of a "competing interests plus" test that, *inter alia*, weighs a state's interest in preventing speech against the speech's redeeming value.

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restricts only the Republican Party point of view.").
[65] *Id*. at 356.
[66] *Id*. at 357–58.
[67] 315 U.S. 568, 571–72 (1942).
[68] ASPCA Brief, *supra* note 59, at 35 (citing the *Chaplinsky* Approach).
[69] United States v. Stevens, 130 S. Ct. 1577, 1585 (2010).
[70] *Id.*

The Majority ultimately determined that depictions of animal cruelty constitute protected speech in part because there is no "long history in American law" prohibiting them.[71] This argument loses strength, however, when one considers that perhaps no long legal history exists because depictions of animal cruelty are of recent origin. The primary mechanism through which the animal cruelty depiction industry operates -- the Internet -- is also in its infancy. Production of such depictions has been so clandestine that few people, including legislators, knew of its existence; when Congress did become aware of the depictions, it acted quickly to prohibit them. As one commentator explained:

> *Stevens*'s strict reliance on history and tradition constitutes an unusual twist on such sources of constitutional interpretation even in the specific context of identifying categorical exemptions from First Amendment protection. Typically, a judge who invokes history and tradition in this context does so in support of limiting First Amendment protection. That is exactly the purpose for which the key Chaplinsky passage itself invoked history and tradition: Chaplinsky's specific holding was to reject a First Amendment challenge to a conviction for expressing provocative religious and political opinions because of the historically enshrined "fighting words" exception to free speech. Therefore, it is noteworthy that the Stevens Court turns that typical use of history and tradition on its head, and converts it into a criterion that forestalls limits on First Amendment protection.[72]

By comparison, the Third Circuit rejected the *Chaplinsky* Approach and instead applied the *Ferber* Approach in determining whether depictions of animal cruelty constitute protected speech.[73] Justice Alito also utilized the *Ferber* Approach but reached the opposite conclusion.[74]

In *New York v. Ferber*, the Court announced five "reasons" it was "persuaded that the States are entitled to greater leeway in the regulation

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[71] *Id.*

[72] Nadine Strossen, *A Big Year for the First Amendment:* United States v. Stevens*: Restricting Two Major Rationales for Content-Based Speech Restrictions,* 2010 CATO SUP. CT. REV. 67, 86 (2010).

[73] *See En Banc Third Circuit Strikes Down Federal Statute Prohibiting the Interstate Sale of Depictions of Animal Cruelty*, 122 HARV. L. REV. 1239, 1243 (2009) [hereinafter *En Banc*] (asserting that, in failing to use the *Chaplinsky* Approach and opting for the *Ferber* Approach instead, the Third Circuit created a precedent inconsistent with the Court's First Amendment jurisprudence).

[74] *Stevens*, 130 S. Ct. at 1599–602 (Alito, J., dissenting).

of *pornographic depictions of children*."[75] Taken together, the Court's use of the word "reasons" and of the phrase "regulation of pornographic depictions of children" suggest that the *Ferber* factors were *not* intended to create a new test to determine whether speech is protected.[76] In fact, the Court even refers to the *Ferber* factors as a "test for child pornography,"[77] further indicating that the factors are inapplicable to *other* types of speech, such as depictions of animal cruelty, that do not consist of child pornography. According to the Government, the Third Circuit's inexplicable rejection of the *Chaplinsky* Approach and its misapplication of *Ferber* seriously misconstrued the Court's First Amendment jurisprudence.[78]

However, the Majority also rejected the *Ferber* Approach, noting, "[o]ur decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment."[79] The Majority did not foreclose the possibility that new and additional categories of unprotected speech may be identified in the future but failed to clarify exactly how it or other courts can make that determination without running afoul of precedent or the Constitution. This lack of clarity threatens to perpetuate additional misapplications of *Ferber*, *Chaplinsky*, and other First Amendment cases.

Furthermore, as one commentator explained, the Majority recast the child pornography at issue in *Ferber* as illustrative of a "'previously recognized, long-established category of unprotected, speech,' rather than a newly minted category, [giving] Ferber . . . only [a] limited capacity to serve as a springboard for judicial recognition of additional categories of unprotected expression, which is how the U.S. government and other proponents of Section 48 had invoked it."[80] As such, after *Stevens*, *Ferber* likely cannot serve as a basis to create new categories of unprotected speech; rather, it can only identify new subsets of speech historically excepted from First Amendment protection.[81]

Rather than declaring Section 48 unconstitutional, the Court could have applied either the *Chaplinsky* Approach or the *Ferber* Approach to create a new category of unprotected speech or held that depictions of animal cruelty fall into existing categories of unprotected speech. Instead, as one commentator observed, *Stevens* is the latest in a line of

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[75] ASPCA Brief, *supra* note 59, at 49-50 (citing New York v. Ferber, 458 U.S. 747, 756–64 (1982)).
[76] *See Ferber*, 458 U.S. at 756–64.
[77] *Id.* at 764.
[78] *En Banc*, *supra* note 73, at 1246.
[79] United States v. Stevens, 130 S. Ct. 1577, 1586 (2010).
[80] Strossen, *supra* note 72, at 88.
[81] *Id.* at 86–87.

decisions "contracting government power to enforce content-based regulations of expression, even when those regulations receive overwhelming support from elected officials and the general public, and even when the expression conveys ideas or depicts actions that most people consider offensive or wrongful."[82]

a. The depictions of animal cruelty that Section 48 targeted constitute low value violent speech, and thus should not warrant First Amendment protection

According to some commentators, the Court could have upheld Section 48 by creating a categorical exclusion for *low value violent speech*, including but perhaps not limited to depictions of animal cruelty. The Court last ruled on content-based restrictions on violent speech in the 1948 case -- *Winters v. New York* -- which involved the obscenity prosecution of a magazine that included "police reports and accounts of criminal deeds."[83] Although that law was invalidated, the Court nowhere indicated that all content-based restrictions on violent speech are unconstitutional.[84] Rather, as one commentator noted, at least some scientific evidence supports the creation of such an exclusion.[85]

Frequent exposure to violent speech can cause what some psychologists term "mean world syndrome" (*i.e.*, "an overly bleak view of society" associated with "higher degrees of fear and distrust") as well as symptomatic fear and anxiety characterized by depression, insomnia, nightmares, and post-traumatic stress disorder symptoms, all of which decrease productivity and incur significant healthcare costs.[86] Recurring exposure may desensitize viewers as evidenced by research indicating that viewers of media violence are less willing to assist victims; one commentator predicts that this could increase crime rates by decreasing intervention and police cooperation.[87]

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[82] *Id.* at 67.

[83] Reynolds*, supra* note 3, at 343 (discussing Winters v. New York, 333 U.S. 507, 508 n.1 (1948)).

[84] *Id*.

[85] *Id*. at 349; *see also* Claire Ponder & Randall Lockwood, *Cruelty to Animals and Family Violence*, INT'L ASS'N OF CHIEFS OF POLICE, TRAINING KEY 526, *2 (2000) [hereinafter TRAINING KEY] (noting that one study indicated that among aggressive criminals in prison, "25 percent reported five or more early acts of cruelty to animals, compared to six percent of non-aggressive criminals and none of the sample of non-criminals. Aggressive criminals were also more likely to report fear or dislike of particular animals.").

[86] Reynolds*, supra* note 3, at 351–52.

[87] *Id.* (citing Douglas A. Gentile & Craig A. Anderson, *Violent Video Games: the Newest Media Violence Hazard*, *in* MEDIA VIOLENCE AND CHILDREN (Douglas A. Gentile ed., 2003)).

Low value violent speech may also offend unwilling or unintended viewers.[88] As one commentator explained, in *FCC v. Pacifica Foundation*, a radio station broadcast a comedian's offensive and graphic monologue; a man who was driving with his young child sued, and the Court held that restricting offensive speech is permissible where the speech invades the privacy of unwilling listeners.[89]

Perhaps the strongest justification for excluding low value violent speech from First Amendment protection is the tremendous harm its production necessitates. Dog-fighting and crush videos, for instance, not only exacerbate the harm of unlawful acts of animal cruelty but are often the cause. A dogfight might be held so that owners can film dogs' fighting styles and thus, increase stud fees, side bets, purses, or sale prices. Likewise, made-to-order crush videos require an animal to be slaughtered according to a viewer's sadistic specifications; in such instances, the depiction is the *direct cause* of the animal cruelty. In *Ferber*, the Court held that child pornography constitutes unprotected speech in part because its subsequent distribution exacerbates the harm.[90] The same harmful production rationale applies to depictions of animal cruelty because, in the case of snuff[91] videos, their production requires an innocent victim to be slowly and painfully tortured to death or, in the case of depictions of animal fighting, victims must endure a lifetime of abuse.

b. The depictions of animal cruelty that Section 48 targeted constitute obscenity, and thus do not warrant First Amendment protection[92]

Other commentators argue that Section 48 did not warrant First Amendment review because the depictions of animal cruelty it targeted fall into *existing* categories of unprotected speech, such as obscenity.[93] In

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[88] *But see id*. at 353 (stating that violent Internet images are less likely to be seen by unwilling viewers than television or radio broadcasts since one must intentionally search for such images).

[89] *Id*. at 352 (citing F.C.C. v. Pacifica Found., 438 U.S. 726, 748–49 (1978)); Debra M. Keiser, *Regulating the Internet: A Critique of* Reno v. ACLU, 62 ALB. L. REV. 769, 776–77, 780 (1998) (discussing the Court's medium-specific First Amendment analysis and arguing that the Internet should be more extensively regulated to protect children from the dangers it poses).

[90] Reynolds*, supra* note 3, at 353–54 (discussing New York v. Ferber, 458 U.S. 747, 763–64 (1982)).

[91] Snuff videos depict animals being killed or tortured by any method whereas crush videos show animals being crushed to death. As such, crush videos are a subset of snuff videos.

[92] ASPCA Brief, *supra* note 59, at 37–42.

[93] *But see* Ricaurte, *supra* note 5, at 192–94 (arguing that expanding the obscenity doctrine to include depictions of animal cruelty would be problematic and that covering depictions of animal cruelty with existing Son of Sam laws is preferable).

describing the scope of Section 48, former President Clinton noted that it would "be limited to material 'designed to appeal to the prurient interest in sex'" -- wording borrowed from the obscenity test the Court articulated in *Miller v. California*.[94]

According to First Amendment obscenity jurisprudence, speech is obscene if: (i) an "'average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest"; (ii) "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"; and (iii) "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[95]

Because obscenity does not contribute to an "essential part of any exposition of ideas, and [is] of . . . slight social value," it does not warrant First Amendment protection.[96] Like the materials that obscenity bans prohibit, the depictions of animal cruelty criminalized by Section 48 are patently offensive, lack redeeming social value, and with regard to crush videos, appeal to depraved sexual fetishes.[97] Crush videos arguably constitute obscenity because they lack redeeming social value, are objectively offensive to the average person applying contemporary community standards, and appeal to the prurient interest of viewers who fantasize that they are being tortured by the dominatrix in the video.[98] As one detective explained, crush video viewers "have foot fetishes . . . want to be the animal as it is crushed . . . [and] enjoy seeing and hearing the bones break."[99] For similar reasons, depictions of bestiality also constitute obscenity.

While opponents of Section 48 argue that obscenity does not embrace *non-sexual* images, such as videos of illegal animal fighting, at least some historical evidence and case law suggest otherwise.[100]

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[94] *Id*. at 183 (discussing Miller v. California, 413 U.S. 15 (1973)).

[95] Reynolds*, supra* note 3, at 372 (citing *Miller*, 413 U.S. at 24).

[96] Chaplinsky v. New Hampshire*,* 315 U.S. 568, 571–72 (1942); *see also Miller*, 413 U.S. at 19 (obscenity constitutes unprotected speech).

[97] ASPCA Brief, *supra* note 59.

[98] *See Miller*, 413 U.S. at 16 (stating that obscene materials "appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."); *Punishing Depictions of Animal Cruelty and the Federal Prisoner Health Care Co-Payment Act of 1999: Hearing on H.R. 1887 and H.R. 1349 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. 1 (1999) [hereinafter *Punishing Depictions*] (statement of Susan Creede, investigator, Ventura County Dist. Attorney Office).

[99] *Punishing Depictions*, *supra* note 98, at 121 (statement of William Paul Lebaron, detective, Long Beach Police Department).

[100] *See Miller*, 413 U.S. at 24; Brief of Amicus Curiae the Humane Society of the United States in Support of Petitioner at 22–26 (2009), United States v.

According to one commentator, nearly all federal obscenity prosecutions involve *violent* pornography or child pornography, and "if pornography without violence is not considered obscene, perhaps it is the violent content, more than the sexual content, which people find patently offensive."[101]

Likewise, some legal scholars support the expansion of obscenity to include depictions of animal cruelty.[102] A description of several crush videos from The Humane Society of the United States ("HSUS") explains why. "High Heel Hell Part III -- The Ritual" involves a partially nude actress who uses spiked heels to trample five large rabbits to death and then drags their bloody corpses into the shape of a cross.[103] In "Kitten Torture and Crush," a sadistic actress repeatedly burns a caged

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Stevens, 533 F.3d 218 (2008) (No. 08-769) [hereinafter HSUS Brief]. Rather than exclusively focusing on sex-related speech, America's early obscenity laws banned religious mockery, depictions of violence and crime, materials thought to endanger public morality, and materials deemed "indecent, lewd, lascivious, obscene, libelous, scurrilous, or threatening delineations, epithets, terms, or language, or reflecting injuriously upon the character or conduct of another." As Richard Posner explained, "violent photographs of a person being drawn and quartered could be. . . described as 'obscene,'" and could even be "included within the legal category of obscene . . . even if they have nothing to do with sex." The plain meaning of the term "obscene" further supports the characterization of depictions of animal cruelty as "obscenity." Accordingly, the HSUS argued in its amicus brief: "Modifying the [obscenity] doctrine slightly to also encompass sadistic videos of animal fighting would make the doctrine more coherent and respectful of legislative prerogatives, without genuinely threatening the important values protected by the First Amendment. Under this revised definition material would be obscene if: (a) the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the depraved or prurient interest; (b) the work depicts or describes, in a patently offensive way, conduct specifically defined by the applicable law; and (c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." HSUS Brief at 22-26; *see also* Adams, *supra* note 2, at 220–21 (highlighting the way that the obscenity doctrine can and should be used to permit restrictions on "low value violent speech," especially to prevent its access to minors and stating that the Eighth Circuit has allowed limited restrictions on "slasher" films portraying rape, murder, and bestiality); Reynolds, *supra* note 3, at 373–74 (in Winters v. New York, the Court "did not foreclose the regulation of violent speech, however, provided that the regulation met the required specificity.").

[101]A recent obscenity prosecution in Pittsburgh involved depictions of women being gang raped and having their throats slit. In another case in 2005, defendants were convicted of selling obscene material for videos purporting to be actual rapes. Federal prosecutors have even secured a guilty plea on an obscenity charge from a woman who wrote stories of young girls being molested, tortured, and killed. Reynolds, *supra* note 3, at 376–77.

[102] *Id*. at 374.

[103] HSUS Brief, *supra* note 100, at 30.

kitten with cigarettes and a cigarette lighter.[104] As if this torture were not enough, the actress then rips the dying, charred kitten from its cage and proceeds to tear it limb–from–limb with her high heel.[105] Another depiction shows dogs hunting a pig that is confined to a pen.[106] With no chance of escape from its impending death, the pig runs back and forth frantically seeking an escape.[107] The maddened dogs leap inside the pen, cornering the pig and ripping chunks of flesh from its back, arms, and legs; the pig is slowly eaten alive.[108] Although snuff videos may, at least at first glance, appear to be inherently worse than depictions of unlawful animal fighting, one must consider that while a snuff video requires a victim to suffer a tortuous death, participants in animal fighting must suffer a *lifetime* of abuse and ultimately, a painful death -- either by the jaws of an opponent or by their owners who may electrocute them if they lose or allow them to die from untreated wounds.

How could such depictions possess redeeming social value? And what reasonable person would not be offended by such gruesome images? Such depictions of animal brutality could only appeal to the basest human beings and undoubtedly violate "community norms"[109] as demonstrated by the fact that a jury determined that the videos at issue in *Stevens* lacked redeeming social value.[110]

Survey evidence and common sense further support the assertion that depictions of animal cruelty violate community norms.[111] According to a 2004 Edge Research survey, 67% of participants stated that preventing animal cruelty was "very important" to them; 13% ranked the issue as "somewhat important"; 18% ranked it as "important"; and only 2% indicated that the issue was "not important."[112] Public outrage surrounding the infamous Michael Vick dog-fighting ring and other recent prosecutions further demonstrates that most Americans object to animal cruelty.[113] Not surprisingly, *People*'s coverage of the story of two

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[104] *Id.*
[105] *Id.*
[106] *Id.* at 31.
[107] *Id.*
[108] *Id.*
[109] *Id.* at 28 (citing Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 574 (7th Cir. 2001)).
[110] United States v. Stevens, 533 F.3d 218, 220–21 (3d Cir. 2008).
[111] *See* LOCKWOOD, *supra* note 3, at 43 ("Animal cruelty is increasingly viewed as a serious issue by professionals in law enforcement and mental health -- as well as by the general public. Animals are part of the majority of American families, and their victimization is of concern to millions.").
[112] *Id*. at 9.
[113] HSUS Brief, *supra* note 100, at 29 (citing United States v. Davidson, 283 F.3d 681, 683 (5th Cir. 2002) (involving snuff videos and rape and torture depictions); United States v. Thomas, 74 F.3d 701, 705 (6th Cir. 1996)

juveniles who murdered seventeen cats and injured twelve others provoked more reader email than any news event except Princess Di's untimely death.[114] In another poignant illustration of public sentiment, when a man tossed a dog into traffic, members of his outraged community donated $120,000 to track him down.[115] Other indicia of public support for animal cruelty prevention include the popularity of television shows highlighting anti-cruelty efforts, the existence of Animal Law courses at many law schools, the creation of Animal Law bar association committees, the widespread establishment of Animal Cruelty Task Forces, and the fact that states increasingly assign felony status to animal cruelty offenses.[116]

Public sentiment also extends to depictions of animal cruelty. For example, in 1997 four teenagers were prosecuted for "burning and bludgeoning" a dog.[117] They videotaped the murder and broadcast the

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(involving depictions of bestiality and abuse)); *see also* Reynolds, *supra* note 3, at 382 ("Public reaction to the revelation of Michael Vick's involvement in a dog fighting ring suggests that many people consider animal cruelty to be quite severe."); LOCKWOOD, *supra* note 3, at 1; Ricaurte*, supra* note 5, at 171 n.5 ("Michael Vick is a former quarterback for the Atlanta Falcons who was sentenced to twenty-three months in federal prison in December 2007 for his involvement in the dogfighting operation 'Bad Newz Kennels.' Vick not only financed the operation but also assisted in the execution of underperforming dogs.") (internal citations omitted); TRAINING KEY, *supra* note 85, at 2 ("[A]n increasingly concerned public has drawn greater attention to animal abuse . . . ."); Frank R. Ascione & Randall Lockwood*, Cruelty to Animals: Changing Psychological, Social, and Legislative Perspectives, in* THE STATE OF ANIMALS: 2001 39, 47 (2001) (discussing a HSUS study, which reported "that 42 percent of respondents believed cruelty to animals to be moderately to extremely serious as a problem . . . . 71 percent supported making animal abuse a felony, and 81 percent felt that the enforcement of cruelty-to-animals laws should be strengthened.").

[114] LOCKWOOD, *supra* note 3, at 1.

[115] *Id*.

[116] *See id*. at 1–2; NATIONAL ASSOCIATION OF ATTORNEYS GENERAL AG BULLETIN (March 2001) ("Delaware Attorney General Jane Brady hosted a National Conference on Animal Cruelty and Interpersonal Violence . . . to discuss the relationship between animal cruelty and violence against people, and policies that are designed to end the cycle of abuse. . . . According to General Brady, 'We've already learned that animal cruelty is both a leading and lagging indicator of violence against human beings. An informed response to incidents of animal cruelty can curb other acts of violence before they happen.' A task force on animal cruelty was created in General Brady's office in November 1999.").

[117] LOCKWOOD, *supra* note 3, at 1.

recording worldwide.[118] The case prosecutor reportedly "received over 5,000 letters in support of her pursuit of the case."[119]

Not only do depictions of animal cruelty offend community norms, but also they lack redeeming social value. Just as traditional forms of obscenity appeal only to base prurient interests rather than communicating socially valuable information, customized crush videos portraying scantily clad women crushing kittens to death or abused dogs tearing off each other's limbs in forced death matches convey nothing but meaningless death and gore.[120]

Taken together, the history of obscenity laws and the layman's definition of obscenity support the conclusion that depictions of animal cruelty are obscene and, thus, undeserving of First Amendment protection.[121] It comes as no surprise then that the findings accompanying the Crush Act state that many crush videos constitute obscenity.[122] As such, if one agrees that the societal interest in preserving and promoting public mores outweighs whatever expressive sole content, if any, such depictions convey, then the Majority could have upheld Section 48 on the ground that it merely prohibited the sale, creation, or possession of unprotected obscenity.

c. The depictions of animal cruelty that Section 48 targeted constitute incitement, and thus do not warrant First Amendment protection

States may lawfully forbid speech advocating the use of force or violating the law where said speech is directed to incite or produce imminent lawless action and is likely to incite or produce such action ("incitement").[123] Because the depictions of animal cruelty that Section 48 prohibited are predicated on illegal acts of vicious animal cruelty without which they cannot be produced, this extremely narrow exception arguably applies to at least some of the speech that Section 48 targeted. To create a crush video a filmmaker solicits an actress to commit a crime of animal cruelty and conspires with her to choreograph and film the brutality -- a film he later sells for profit again and again. As such, the depictions arguably constitute speech that incites and produces the imminent crimes of solicitation to commit animal cruelty, conspiracy to

[118] *Id.*
[119] *Id.*
[120] HSUS Brief, *supra* note 100, at 27 (citing Kevin W. Saunders, *Media Violence and the Obscenity Exception to the First Amendment*, 3 WM. & MARY BILL RTS. J. 107, 166 (1994) ("Violence does not, in itself, express a point of view on important issues; its effect is visceral and noncognitive.")).
[121] *Id.*
[122] P.L. 111-294, H.R. 5566.
[123] ASPCA Brief, *supra* note 59, at 23–24 (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).

commit animal cruelty, aiding and abetting the commission of animal cruelty, and the commission of animal cruelty to the extent such crimes exist in the relevant jurisdiction.[124] In the case of made-to-order crush videos, a purchaser specifies, *inter alia*, the details of the torture method and duration, nature of the victim, and perhaps even the killer's attire; the purchase necessitates the commission of each of the aforementioned crimes. Not surprisingly, the findings accompanying the Crush Act state, "serious criminal acts of extreme animal cruelty are integral to the creation, sale, distribution, advertising, marketing, and exchange of animal crush videos."[125]

Section 48 only targeted the commercial trafficking of images that lack serious value but memorialize (and incite) crime for commercial gain.[126] First Amendment jurisprudence permits prohibitions on speech that proposes, abets, or constitutes a crime. This is why states lawfully criminalize speech that constitutes fraud, perjury, or solicitation.[127] Just as those laws coexist harmoniously with the First Amendment, so too, did Section 48.

Critics of *Stevens* argue that the decision makes crime pay by permitting filmmakers to profit from their facilitation of crime.[128] Dog-fighting videos make crime more profitable because such videos evidence a dog's "champion" status, showcase its fighting style to

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[124] *Id*. at 24 (citing Hanna Gibson, *Dog Fighting Detailed Discussion, Animal Legal & Historical Center*, ANIMAL LEGAL AND HISTORICAL CENTER, 2005, *available at* http://www.animallaw.info/articles/ddusdogfighting.htm).

[125] P.L. 111-294, H.R. 5566.

[126] Section 48 prohibits a person from inciting criminal conduct so that such conduct can be created and sold for commercial gain. A PBS documentary of dog-fighting in the United States would be lawful although it memorializes criminal conduct, so long as it possesses serious educational value.

[127] *Id.* at 10.

[128] *See* United States v. Stevens, 130 S. Ct. 1577, 1600–01 (2010) (Alito, J., dissenting) ("Section 48's ban on trafficking in crush videos also helps to enforce the criminal laws and to ensure that criminals do not profit from their crimes. . . . We have already judged that taking the profit out of crime is a compelling interest. . . . The statutory ban on commerce in dogfighting videos is also supported by compelling governmental interests in effectively enforcing the Nation's criminal laws and preventing criminals from profiting from their illegal activities.") (citing Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 119 (1991)); Kinsella, *supra* note 15, at 384 ("Admittedly, it remains unclear where exactly courts draw the line between protected depictions and those the government may constitutionally proscribe. Crush videos, however, simply fall on the latter side of the line. There is no First Amendment right to profit from animal cruelty."); Ricaurte, *supra* note 5, at 188 (a Long Island crush filmmaker used a website and advertising in pornographic magazines to sell "bloodied high heels" used to crush animals during the making of crush videos).

potential buyers,[129] and increase side bets, purses, entry fees, sale prices, and stud fees.[130] Clearly then, the creation and commercial distribution of depictions of animal cruelty generate interest and participation in the crimes of animal fighting and animal cruelty, either facilitating, or worse yet, provoking their commission.

However, some commentators argue that the incitement doctrine covered only a small subset of the depictions that Section 48 reached and failed to consider the value of the speech.[131] More importantly, in *Ashcroft v. Free Speech Coalition*, the Court held that the government may not "prohibit speech because it increases the chance that an unlawful act will be committed at some indefinite future time because 'the mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.'"[132] As such, a finding that depictions of animal cruelty may promote future criminal acts likely would have been insufficient, standing alone, to save Section 48; nor will it render the Crush Act invulnerable to constitutional challenges.

3. Depictions of Animal Cruelty Constitute Unprotected Speech under the Ferber Approach

The *Ferber* Court upheld a statute prohibiting persons from knowingly promoting sexual performances by minors under the age of 16 by distributing depictions of such performances.[133] The Court articulated five "reasons" that states may prohibit child pornography: (1) the State has a compelling interest in regulating it; (2) the speech is "intrinsically related" to the underlying crime depicted; (3) advertising and selling the speech provides an economic motive for, and is thus integral to, its production; (4) the possibility that any material of serious value would be prohibited under the newly created category of unprotected speech is "exceedingly modest, if not, de minimis:" and (5) banning full categories of speech is an acceptable approach in First Amendment law and was appropriate under the circumstances.[134]

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[129] ASPCA Brief, *supra* note 59, at 10.

[130] *Id.;* Mandak, *supra* note 11 ("[S]ome people bet as much as $10,000 on a single [dog] fight, and the purse for a night of fighting could be as much as $50,000 . . . .").

[131] Reynolds, *supra* note 3, at 368–70.

[132] *Id*. at 368 (citing Ashcroft v. Free Speech Coalition, 535 U.S. 234, 253 (2002) (discussing virtual child pornography)). This case is distinguishable because virtual child pornography does not necessitate actual harm to living victims. *See also* Ricaurte, *supra* note 5, at 189–90.

[133] New York v. Ferber, 458 U.S. 747, 756–57 (1982).

[134] *Id.* at 756–63. *But see* Ricaurte, *supra* note 5, at 187 ("Further, the statute is overinclusive because it has the potential to restrict valuable speech. Although the law has an exception for works with 'serious religious, political, scientific,

The Third Circuit held that the depictions of animal cruelty targeted by Section 48 failed to satisfy the *Ferber* factors primarily because of the inherent differences between children and animals.[135] A flaw in this argument is that the Court has never explicitly stated that a compelling interest must involve the welfare of humans rather than animals.[136] As Justice Alito explained, "while protecting children is unquestionably more important than protecting animals, the Government also has a compelling interest in preventing the torture depicted in crush videos. . . . [T]he statutory ban on commerce in dogfighting videos is also supported by compelling governmental interests in effectively enforcing the Nation's criminal laws and preventing criminals from profiting from their illegal activities."[137] Preventing cruelty to animals and to children

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educational, journalistic, historical, or artistic value,' the test is subjective and some fact finders could decide that the work does not have 'serious' value but merely aims to 'shock, titillate, and get ratings.' For example, a video of a bullfight taking place in Spain might well be deemed to have serious value. A harder case would be a depiction of an underground cockfight in Puerto Rico. Like Spain, Puerto Rico has a long history of the sport, and many have argued that it is part of Puerto Rico's culture. However, because the tradition of cockfighting in Puerto Rico might not be as well-known to American juries as bullfighting in Spain, there is a risk it could be deemed to lack serious historical or educational value, whereas the bullfighting in Spain would not. This could lead to dissimilar results in similar cases and could put juries in the position of placing value judgments on the activities of another culture.").

[135] ASPCA Brief, *supra* note 59, at 34 (citing United States v. Stevens, 533 F.3d 218, 232 (3d Cir. 2008)); *see also* Kinsella, *supra* note 15, at 373 ("[T]he Stevens court failed to assign sufficient weight to the human interest implicit in preventing animal cruelty, and thus made an erroneous distinction between humans and animals.").

[136] *See* Brief for a Group of American Law Professors as Amicus Curiae in Support of Neither Party at 10, United States v. Stevens, 533 F.3d 218 (2008) (No. 08-769) [hereinafter Law Professors' Brief]; Reynolds, *supra* note 3, at 384–85 ("Incitement of imminent unlawful activity is a compelling interest, yet there is no requirement that the unlawful activity be directed towards humans. . . . And, more to the point, the reason that most compelling interests involve humans is because the Supreme Court has never had the occasion to consider whether protecting animals is a compelling interest. That the Court has never considered the issue has no bearing on the Court's stance on the issue.") (footnote omitted); Kinsella, *supra* note 15, at 372, 374 ("There is no bright-line test for determining which government interests qualify as compelling. Instead, societal consensus in the form of legislative judgment often informs what constitutes an interest compelling enough to allow infringement on free speech rights. . . . By drawing a First Amendment line between humans and animals, the court neglected societal consensus and erroneously analyzed the compelling interest prong. Certainly, the Supreme Court has not yet recognized a nonhuman interest as sufficiently compelling to justify a content-based restriction. The high court, however, has not had occasion to consider animal cruelty in light of the Free Speech Clause -- until now.").

[137] United States v. Stevens, 130 S. Ct. 1577, 1602 (2010) (Alito, J., dissenting).

are not mutually exclusive interests. In fact, the ASPCA utilized animal cruelty legislation to prosecute child abuse before the existence of child protection laws.[138]

Although the Majority indicated that the *Ferber* factors do not establish a new general test to determine whether a category of speech is protected, Justice Alito and the Third Circuit disagreed. This section of the Article will address each of the five *Ferber* factors in turn. Doing so is necessary because while the Majority rejected the *Ferber* Approach, the Third Circuit and Justice Alito utilized it, albeit to reach very different conclusions. An exploration of the *Ferber* factors, therefore, is necessary to explore how the Court could and perhaps should have invoked the *Ferber* Approach to uphold Section 48.

The first factor is especially significant because the Majority did not hold that preventing animal cruelty fails to constitute a compelling government interest. In fact, the Majority avoided addressing this issue completely by striking the statute on overbreadth grounds. For this reason, animal rights groups considered *Stevens* a small victory of sorts. Had the Majority determined that preventing animal cruelty does not constitute a compelling interest, *Stevens* could have undone, or at least imperiled, the last century's progress in the area of animal rights as well as other animal rights legislation. In the wake of *Stevens*, the question of whether preventing animal cruelty constitutes a compelling government interest is perhaps the most important consideration because the Crush Act has allegedly "fixed" the overbreadth problems observed by the Majority. Assuming the overbreadth problems have truly been corrected, then the first challenge to the Crush Act may require the Court, if it grants certiorari, to definitively resolve whether preventing animal cruelty constitutes a compelling government interest.

a. Preventing animal cruelty constitutes a compelling government interest

In the absence of controlling precedent to the contrary, preventing animal cruelty constitutes a compelling government interest because anti-cruelty efforts exist nationwide and serve a variety of laudable social goals, including but not limited to protecting property interests, preventing emotional and physical harm to humans, identifying and preventing interpersonal violence, and decreasing the likelihood of future crimes against humans and animals, including interpersonal violence, drug and weapons trafficking, and gambling. Accordingly, the

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[138] TRAINING KEY, *supra* note 85, at 1 ("[I]n 1874 a notorious child abuse case in New York was prosecuted by the American Society for Prevention of Cruelty to Animals (ASPCA) under existing animal welfare laws.").

findings in the Crush Act confirm that preventing intentional acts of extreme animal cruelty constitutes a compelling government interest.

i. The Court Has Never Held that Preventing Cruelty to Animals Fails to Constitute a Compelling Government Interest

The Court has never resolved the question of whether preventing animal cruelty constitutes a compelling government interest. Prior to *Stevens*, the issue was before the Court only once, in *Lukumi*.[139] The Third Circuit misinterpreted *Lukumi* to indicate that preventing animal cruelty fails to constitute a compelling government interest;[140] however, the *Lukumi* Court never explicitly ruled on the issue.[141] In fact, some commentators suggest that *Lukumi* supports the opposite conclusion.[142]

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[139] 508 U.S. 520 (1993); *see also Stevens*, 533 F.3d at 227 (concluding that given *Lukumi*, *inter alia*, the Third Circuit should not create a new category of unprotected speech unless the U.S. Supreme Court instructs it to do so); Kinsella, *supra* note 15, at 362 ("To date, the United States Supreme Court has addressed animal cruelty in the First Amendment context only once.").

[140] Kinsella, *supra* note 15, at 372–73 ("The court erroneously suggested there is no compelling government interest in preventing animal cruelty in the First Amendment context. The court erred in its analysis . . . . [T]he court erroneously interpreted *Lukumi* as indicating the Supreme Court's view that . . ." preventing cruelty to animals is not a compelling government interest.); *see also* Ricaurte, *supra* note 5, at 184 (stating courts cannot rely upon *Lukumi* to support the assertion that preventing cruelty to animals fails to constitute a compelling government interest).

[141] Reynolds, *supra* note 3, at 384 ("The Third Circuit found that the Court in Church of the Lukumi Babalu Aye v. City of Hialeah at least 'hinted' that prevention of animal cruelty is not compelling enough to overcome fundamental human rights . . . . However, *Lukumi* never confronted such a question. It assumed that protection of animals was a compelling interest, yet found that the ordinance was not narrowly tailored to serve that interest, demonstrating that the true intent of the ordinance was to suppress the practice of Santeria."); Kinsella, *supra* note 15, at 375 ("In *Lukumi*, the Supreme Court held that Church members could freely practice Santeria, including ritual animal sacrifice, under rights guaranteed by the Free Exercise Clause. The Court recognized a compelling government interest in preventing animal cruelty, but ultimately determined the legislature's actual motive was to suppress religion. Thus, the Court did not decide whether a law genuinely seeking to prevent animal cruelty necessitated a religious exemption due to the Free Exercise Clause. The city ordinances at issue in *Lukumi* singled out and directly burdened religion; the ordinances did not implicate the interest in animal protection that the high court recognized as compelling."). *But see* Ricaurte, *supra* note 5, at 194 ("The Supreme Court has never recognized a compelling interest in regard to animals.").

[142] Kinsella, *supra* note 15, at 364, 376 (In *Lukumi*, "the Court recognized as legitimate the governmental interest in preventing animal cruelty . . . . The Stevens court incorrectly construed Lukumi's holding as suggesting a Supreme

In *Lukumi*, the Court invalidated a law banning animal sacrifice that had been enacted to burden the exercise of a religion -- Santeria.[143] A Santerian church leased land in Hialeah, Florida, with the intent of openly practicing its religion, which involved animal sacrifice; in response, Hialeah enacted ordinances aimed at prohibiting ritualized animal sacrifice.[144] The church sued, alleging a violation of its constitutional rights.[145] The district court upheld the ordinances and found that preventing cruelty to animals was a compelling interest; the Eleventh Circuit affirmed.[146] The Court declared the ordinances unconstitutional because Hialeah enacted them to suppress religious expression, not to prevent animal cruelty.[147] The Court noted that Hialeah could have used less restrictive alternatives to accomplish its goals.[148] *Lukumi* is also distinguishable from *Stevens* because *Lukumi* involved the free exercise of religion, not free speech.[149]

Notably, the Court *never* held that preventing animal cruelty fails to constitute a compelling government interest.[150] In fact, Justice Blackmun's concurrence in *Lukumi* suggests the opposite conclusion.[151] He emphasized:

> The result in the case before the Court today, and the fact that every Member of the Court concurs in that result, does not necessarily reflect this Court's views of the strength of a State's interest in prohibiting cruelty to animals. This case does not present, and I therefore decline to reach, the question [of] whether the Free Exercise Clause would require a religious exemption

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Court view that preventing animal cruelty was not compelling in light of human rights. Justice Blackmun's concurrence in Lukumi highlights this error."); Adams, *supra* note 2, at 210 ("Although the Court [in *Lukumi*] found a legitimate governmental interest in preventing cruelty to animals, the Court decided this interest could be addressed by a restriction that did not go as far as prohibiting all of the Santeria sacrificial practices.").

[143] 508 U.S. at 540–47.

[144] Kinsella, *supra* note 15, at 362–63.

[145] *Id.* at 363.

[146] *Id*.

[147] *Id*.

[148] *Id*. at 363–64.

[149] ASPCA Brief, *supra* note 59, at 19.

[150] Kinsella, *supra* note 15, at 373 ("[T]he court erroneously interpreted Lukumi as indicating the Supreme Court's view that the government interest at issue in § 48 -- preventing animal cruelty - is not compelling.").

[151] ASPCA Brief, *supra* note 59, at 20 (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 580 (1993) (Blackmun, J., concurring)).

> from a law that sincerely pursued the goal of protecting animals from cruel treatment.[152]

As the dissenting judges in *Stevens* explained:

> [T]he ordinances . . . [in *Lukumi*] failed not because preventing cruelty to animals was not a sufficiently paramount interest to be deemed compelling; rather, the Court found that the ordinances were so riddled with exceptions exempting all other killings except those practiced by Santeria adherents betrayed that the real rationale behind the prohibitions was an unconstitutional suppression of religion.[153]

The Third Circuit may have misinterpreted *Lukumi* because it had no other precedent to support its assertion that preventing animal cruelty is not a compelling interest.[154] However, just as the Third Circuit misconstrued *Lukumi* to indicate that preventing animal cruelty does not constitute a compelling government interest, without clear guidance to the contrary from the Court, so too, may other courts and legislators misinterpret *Stevens* as requiring them to strike down or narrow the scope of existing animal cruelty legislation and other animal welfare laws, even where the laws differ from Section 48 in language, purpose, or effect.

ii. Nationwide Consensus

The widespread adoption and long history of anti-cruelty legislation around the world indicate that preventing animal cruelty constitutes a compelling government interest.[155] Anti-cruelty laws, some of which

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[152] *Id.*; Kinsella*, supra* note 15, at 373 ("The Stevens court ignored Justice Blackmun's concurrence, which makes explicit the high court's belief in the strength of just such a compelling interest.").

[153] United States v. Stevens, 533 F.3d 218, 240 (3d Cir. 2008) (Cowen, J., dissenting).

[154] Law Professors' Brief, *supra* note 136, at 7–11.

[155] ASPCA Brief *supra* note 59, at 4; Kinsella*, supra* note 15, at 374–75 ("[W]hen determining whether a government interest is compelling, the Supreme Court often looks to societal consensus in the form of nationwide legislative prevalence. In Ferber, for example, the Court supported its finding of a compelling interest by citing legislative judgment. Almost all the states and the federal government have enacted legislation aimed at combating child pornography. That legislative judgment combined with literature detailing the effects on children used as pornography subjects 'easily passe[d] muster under the First Amendment.' Although noting the comprehensive state statutory schemes designed to prevent animal cruelty, the Stevens majority failed to give this legislative judgment appropriate weight. Indeed, as explained by the dissent, the United States has a long-standing aversion to animal cruelty with

predate the nation's founding, exist in every state, the District of Columbia, Puerto Rico, the Virgin Islands, and in countries around the world.[156] Congress has also enacted numerous animal welfare laws.[157]

The Massachusetts Colony enacted America's first animal cruelty law over 350 years ago; it prohibited "any [t]irrany or [c]rueltie towards any bruite creature which are usuallie kept for man's use."[158] In 1781, English barrister Jeremy Bentham argued that an animal's capacity for suffering, not its ability to talk or reason, entitles it to legal protection.[159] In 1821, Maine enacted a law, which punished anyone who "cruelly beat any horse or cattle" with fines and up to thirty days in prison.[160] New

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the first laws proscribing such cruelty enacted in 1641. That all fifty states and the federal government have passed statutes prohibiting the underlying conduct at issue in § 48 demonstrates that preventing animal cruelty rises to the level of compelling."); Ricaurte , *supra* note 5, at 177.

[156] ASPCA Brief, *supra* note 59, at 5 (citing *Stevens*, 533 F.3d at 224 n.4 (3d Cir. 2008) (listing current state animal protection laws); Luis E. Chiesa, *Why Is It a Crime to Stomp on a Goldfish? Harm, Victimhood and the Structure of Anti-Cruelty Offenses*, 78 MISS. L.J. 1, 4 (2008) ("Comprehensive anti-cruelty legislation has been adopted in many countries, including the United Kingdom, Holland, Australia, and Argentina, to name a few."); LOCKWOOD, *supra* note 3, at 5 ("In England, the first comprehensive animal protection law was introduced by Richard 'Humanity Dick' Martin and passed June 10, 1822. This 'Act to Prevent the Cruel and Improper Treatment of Cattle' also protected horses, sheep, cows and mules, providing for fines of up to 5 pounds and up to 3 months in prison for mistreatment of such livestock. The Society for the Prevention of Cruelty to Animals (SPCA) was founded in England in 1824 to ensure that this legislation would be enforced. It funded its own constables and eventually earned the support of the Queen, becoming the Royal SPCA in 1840.").

[157] LOCKWOOD, *supra* note 3, at 32 ("Some animal cruelty cases may involve actions that violate . . . federal laws including the Humane Slaughter Act, the Endangered Species Act, the Wild Bird Conservation Act, the Bald and Golden Eagle Protection Act, the Marine Mammal Protection Act and the Wild Horses and Burros Act. Some animal poisoning cases may include violations of the Federal Insecticide, Fungicide, and Rodenticide Act. Cases that could involve the application of federal charges are likely to also include state animal cruelty violations and may require close coordination of actions with federal prosecutors.").

[158] *Id*. at 5 ("The earliest printed legal code in America, 'The Body of Liberties' established by the Puritans of the Massachusetts Bay Colony in 1641, included among the 100 'liberties' two provisions protecting animals . . . .").

[159] *Id*.

[160] Ricaurte, *supra* note 5, at 177; LOCKWOOD, *supra* note 3, at 6 ("The first American law that moved away from these limitations was in Maine (1821), prohibiting cruelly beating any horse or cattle -- regardless of ownership. This was the earliest indication of a law addressing concern for the welfare of the animal itself.").

York followed suit in 1829 when it enacted an animal cruelty law, which stated:

> Every person who shall maliciously kill, maim or wound any horse, ox or other cattle, or any sheep, belonging to another or shall maliciously and cruelly beat or torture any such animals, whether belonging to himself or another, shall upon conviction, be adjudged guilty of a misdemeanor.[161]

Through the years, other states enacted animal cruelty laws. Perhaps in recognition of the significant impact of animal cruelty on public mores, such laws were often incorporated into portions of the legislative code involving public morals and decency.[162]

Animal cruelty statutes even preceded child protection laws.[163] In the 1860s, New York enacted legislation giving North America's oldest animal rights organization -- the ASPCA -- the power to investigate and prosecute animal cruelty.[164] ASPCA founder Henry Bergh successfully lobbied for enactment of a more comprehensive animal cruelty law in New York, which among other things, applied to any living animal regardless of ownership, expanded the list of unlawful acts to include neglect, torture, starvation, and mutilation, and was the first law to ban animal fighting.[165] Prior to the creation of child protection laws, the ASPCA prosecuted an infamous child abuse case under existing animal anti-cruelty laws.[166] Later, Bergh helped to create the Society for the Prevention of Cruelty to Children, underscoring the fact that the same moral arguments underlie the enactment of legislation to protect children and animals -- those most vulnerable to wanton acts of cruelty.[167]

Dog-fighting is such a tremendous social harm that, despite the existence of *general* anti-cruelty statutes in every state, separate laws in

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[161] *Id.* (citing N.Y. REV. STAT. tit. 6, §26 (1829)).
[162] LOCKWOOD, *supra* note 3, at 6 (New Hampshire's animal cruelty section was included in the same section as laws relating to adultery, blasphemy, grave robbing and tomb desecration. Minnesota's animal cruelty provision was located in the same section as penalties for attending a dance on the Sabbath.).
[163] For a general discussion of the history of legislation criminalizing animal cruelty, *see* Chiesa, *supra* note 156, at 8–13.
[164] ASPCA Brief, *supra* note 59, at 4 (citing ASPCA History Page, http://www.aspca.org/about-us/history.html (last visited June 10, 2009)); LOCKWOOD, *supra* note 3, at 7; Mark J. Parmenter, *Does Iowa's Anti-Cruelty to Animals Statute Have Enough Bite?*, 51 DRAKE L. REV. 817, 823–824 (2003).
[165] LOCKWOOD, *supra* note 3, at 7.
[166] TRAINING KEY, *supra* note 85, at 1.
[167] ASPCA Brief, *supra* note 59, at 4 (citing ASPCA Milestones, *available at* http://www.aspca.org/pressroom/press-kit/aspca-milestones-2009.pdf (last visited June 12, 2009)).

all fifty states and the District of Columbia *specifically* prohibit the practice.[168] Most states punish dog-fighting as a felony,[169] and many also ban any and all activities related to dog-fighting, such as attending a fight or promoting a match.[170] Furthermore, every state and the District of Columbia ban cockfighting.[171] As of 2006, forty-one states and the District of Columbia also prohibited attending a cockfight, and several states criminalize the possession of cockfighting paraphernalia.[172]

Congress has also vocalized its belief that preventing animal cruelty constitutes a compelling government interest by enacting legislation that does just that.[173] Federal law bans the transport of animals for use in animal fighting,[174] and the Animal Welfare Act prohibits the transportation or export of fighting cocks.[175] Like Section 48, these laws satisfy the public's strong desire that animals be treated humanely.[176] In addition, state and local governments, non-profit organizations, charities, and personal donors annually expend millions of dollars -- over and above their tremendous time and effort -- to promulgate anti-cruelty legislation, to investigate and prosecute animal cruelty, and to house and rehabilitate animal victims.[177]

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[168] LOCKWOOD, *supra* note 3, at 21.

[169] *Id*. ("As of 2006, dogfighting is a felony in all states except Idaho and Wyoming, where it is a misdemeanor."); Ricaurte, *supra* note 5, at 177 ("Forty-three of the states make certain acts of animal cruelty a felony.").

[170] ASPCA Brief, *supra* note 59, at 6 (citing Gibson, *supra* note 124 (dog-fighting is illegal in 50 states and a felony in 48 states, D.C., Puerto Rico, and the Virgin Islands)).

[171] Ricaurte, *supra* note 5, at 177 ("[D]ogfighting and cockfighting are now outlawed in all fifty states, with Louisiana's 2008 ban making it the final state to ban cockfighting."); Will Connaghan, *Constitution Shields Questionable Entertainment*, ST. LOUIS DAILY REC., July 18, 2007, at 1.

[172] LOCKWOOD, *supra* note 3, at 22.

[173] ASPCA Brief, *supra* note 59, at 6, n.11 (citing United States v. Stevens, 533 F.3d 218, 239–239 (3d Cir. 2008) (Cowen, J., dissenting) (citing 7 U.S.C. § 2131 (2009) (mandating humane treatment and care of animals to be used in research or sold); 7 U.S.C. § 1902 (2009) (requiring humane animal slaughter); 7 U.S.C. § 2156 (2009) (making it unlawful to sponsor an animal in a fighting venture))).

[174] LOCKWOOD, *supra* note 3, at 21–22.

[175] *Id*. at 22.

[176] ASPCA Brief, *supra* note 59, at 6 (citing H.R. REP. NO. 106-397, at 3 (1999) ("[t]hese legislative enactments evidence society's desire to ensure that animals are treated humanely")).

[177] HSUS Brief, *supra* note 100, at 6–7; LOCKWOOD, *supra* note 3, at 26–27 (discussing the tremendous costs incurred when abused animals require housing, food, veterinary care, etc.); The Humane Society of the United States, *Judge Strikes Major Financial Blow Against Dog Fighting in New York* (Nov. 22, 2005) (In describing the cost of care to dogs seized from convicted dogfighter and owner/operator of Sporting Dog Journal James Fricchione,

The widespread enactment of animal fighting bans and general anti-cruelty statutes suggests that most Americans support the criminalization of animal cruelty. This nationwide consensus strongly indicates that preventing animal cruelty constitutes a compelling government interest. Yet, unlike the *Ferber* Court, which refused to second-guess legislative judgment and afforded deference to research regarding the impact of child pornography, the Third Circuit and the Majority appear to have given little or no deference to the indisputable and important fact that every state outlaws animal cruelty and animal fighting.[178] Instead, the Majority second-guessed Congressional judgment regarding the importance of criminalizing depictions of animal cruelty and preventing the acts of animal cruelty their production necessitates. As Justice Alito observed, "the Court of Appeals erred in second-guessing the legislative judgment about the importance of preventing cruelty to animals."[179]

iii. Enhanced Prevention and Detection of Animal Cruelty

Law enforcement officials have long emphasized that existing anti-cruelty legislation is insufficient to prevent and punish animal cruelty.[180] Section 48 was not redundant because existing anti-cruelty laws likely do not cover the creation, sale, or possession of depictions of animal cruelty, and state anti-cruelty laws vary widely in the scope of their coverage.[181] Section 48 aimed "to augment, not supplant, state animal cruelty laws by addressing behavior that may be outside the jurisdiction of the states, as a matter of law, and appears often beyond the reach of

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HSUS Program Coordinator Samantha Mullen remarked: "The Shelters that courageously assisted the law enforcement authorities by taking charge of the dogs seized in this case certainly deserve to be indemnified . . . . They incurred enormous financial as well as emotional burdens. In addition, they were targets of burglary attempts because fighting dogs are notoriously coveted by criminals who know their worth in the underground world of blood sports."); People v. Fricchione, No. 03-00403, 43 A.D.3d 410, (N.Y. App. Div. Feb. 20, 2007) (ordering Fricchione to pay $136,303.13 to Warwick Valley Humane Society).

[178] *United States v. Stevens*, 130 S. Ct. 1577, 1598–1600 (2010) (Alito, J., dissenting).

[179] *Id.* at 1600.

[180] ASPCA Brief, *supra* note 59, at 7 (citing 145 CONG. REC. H10267, H10267 (daily ed. Oct. 19, 1999) (statement of Rep. McCollum) (discussing difficulties inherent in prosecuting alleged violations of anti-cruelty statutes)).

[181] LOCKWOOD, *supra* note 3, at 15–16 (discussing how state anti-cruelty laws contain differing (and sometimes antiquated) definitions of "animal" and "animal cruelty," and noting that several "state laws reserve felony penalties for crimes against companion animals, while others treat only acts against livestock as potential felony offenses."); Ricaurte, *supra* note 5, at 178 (discussing how state laws define "animal" differently); Jennifer S. Rosa, *Recent Developments in New York Law - Chapters 118 and 208 of the Laws of 1999: The New York Legislature Develops a Pseudo Animal Rights Agenda*, 74 ST. JOHN'S L. REV. 287, 287–88 (2000).

their law enforcement officials, as a practical matter."[182] Section 48 filled loopholes in existing anti-cruelty legislation by covering: (i) depictions of animal cruelty rather than the underlying conduct itself, which is sometimes covered under existing law; (ii) all living animals, regardless of ownership or domestic status; and (iii) abusers, regardless of whether they own the animal victim. Section 48 penalized the misconduct more severely, punishing it as a felony whereas many states classify animal abuse as a misdemeanor.[183] The harsher penalty arguably increased the incentive to prosecute and decreased the incentive to commit the crime.[184]

Aside from the non-uniformity and inadequate coverage of most state legislation, many crush and dog-fighting videographers cleverly refuse to film (or later edit out) identifying information about participants and the film's setting, making it impossible for prosecutors to establish where the cruelty occurred.[185] Where unable to prove

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[182] ASPCA Brief, *supra* note 59, at 7 (citing H.R. REP. NO. 106-397, at 3 (1999)). As Congressman McCollum explained during legislative debate on the law: "[Section 48] is a necessary *complement* to State animal cruelty laws. Congress alone has the power to regulate interstate commerce, and this bill does just that . . . . It does not create a new Federal crime to punish the harm to the animals itself, rather it leaves that to State law, where it properly lies. What it does do is restrict the conduct that heretofore has gone on unchecked by State law, the sale across State lines of these horrible depictions for commercial gain." 145 CONG. REC. H10267, H10267 (daily ed. Oct. 19, 1999) (statement of Rep. McCollum) (emphasis added).

[183] Beth Ann Madeline, *Cruelty to Animals: Recognizing Violence Against Nonhuman Victims*, 23 U. HAW. L. REV. 307, 316–17 (2000); Chiesa, *supra* note 156, at 10 (As of 2008, Alabama regarded cruelty in the first degree toward a dog or cat to be a felony; the same abuse to a rabbit, horse, etc., is a misdemeanor).

[184] Redundancy would have been an insufficient justification to strike Section 48 since "there is no requirement in Ferber that child pornography laws be limited to depictions that existing child abuse laws would not otherwise reach. . . . [T]here is no requirement [in Ferber] that the act depicted even be illegal" as Section 48 required. Reynolds, *supra* note 3, at 385.

[185] ASPCA Brief, *supra* note 59, at 7; Ricaurte, *supra* note 5, at 182–83. ("Although acts of animal cruelty were already illegal in all fifty states, proponents of the statute argued that it was necessary to assist states in prosecuting under their anticruelty laws. Prosecuting crush-video production under state animal-cruelty laws is difficult for three reasons. First, there is difficulty in identifying the actor. Women in crush videos are typically shown from the waist down, and the only identifying features are their voices. Second, it is hard for the prosecutor to show that the act took place within the court's jurisdiction and within the statute of limitations. Production of crush videos is by nature a clandestine operation that usually takes place inside the video-maker's home. Therefore, it is difficult to determine the time and place of the act from the video. Third, although the underlying acts of cruelty are illegal under state laws, the production, sale, and distribution of the videos are not.

jurisdiction, the case will be dismissed because prosecutors cannot show that the torture was illegal within the laws of the relevant state.[186] Filmmakers also deliberately remove identifying information regarding the depiction's date of creation, making it extremely difficult to prove that the conduct occurred within the applicable statute of limitations.[187] Section 48 solved this problem because the statute of limitations began to toll on the date on which the video was sold, created, or possessed, which was easier to prove and verify.[188] Moreover, filmmakers intentionally record the executioner from the waist down, making it impossible to identify her, and deliberately black out faces in dog-fighting videos.[189] For instance, Stevens deliberately edited out the faces of dog handlers in Pick-A-Winna.[190] As such, there is usually no way to determine when, where, and by whom the animal cruelty occurred; local authorities cannot secure a conviction of those who commit the acts of cruelty portrayed or who make and sell these highly disturbing portrayals.[191] Prior to Section 48's enactment, the sole means by which prosecutors could convict someone for producing such depictions would literally be for undercover law enforcement officers or civilians to discover the scene during filming, arrest the participants, and testify at trial; this situation is extremely unlikely, and perpetrators know it.[192] With no incentive to stop, the cruelty intensified and the industry grew.

Anecdotal evidence also indicates that prosecuting persons involved in the animal cruelty industry may simultaneously prevent future crimes toward humans (or result in the incarceration of perpetrators of past crimes against humans). In Philadelphia, two men brutally shot Edward Atwood in front of his family.[193] Shortly thereafter, three men attacked and doused six dogs with drain cleaner, bleach, and pancake mix.[194] As a result, five of the dogs had to be euthanized.[195] The men were arrested,

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Therefore, prosecution would only be possible under state laws if the person was caught in the act 'through an undercover operation.' Such an undercover operation is unlikely since prosecutors are often reluctant to bring charges of animal cruelty due to limited resources.") (citations omitted).

[186] ASPCA Brief, *supra* note 59, at 7.

[187] *Id.* (citing *Punishing Depictions*, *supra* note 98 (statement of William Paul LeBaron, Detective, Long Beach Police Dep't)).

[188] *Id*. (citing *Punishing Depictions, supra* note 98 (statement of Tom Connors, Deputy Dist. Attorney, Ventura Cnty. Dist. Attorney's Office)).

[189] *Id.* at 8 (citing United States v. Stevens, 533 F.3d 218, 245 (3d Cir. 2008) (Cowen, J., dissenting)).

[190] *Id.*

[191] *Id.* at 7 (citing 145 CONG. REC. H10267 (daily ed. Oct. 19, 1999)).

[192] *Id.* at 8, n.13 (citing *Punishing Depictions*, *supra* note 98 (statement of Tom Connors, Deputy Dist. Attorney, Ventura Cnty. Dist. Attorney's Office); Ricaurte*, supra* note 5, at 183.

[193] TRAINING KEY, *supra* note 85, at 1.

[194] *Id*.

[195] *Id*.

and when their photographs were shown on television, Mr. Atwood's wife identified one of them as her husband's murderer.[196] Ironically, the man had been hired to kill Mr. Atwood because he complained about a neighbor's improper care of his pet.[197]

iv. Prevention of Emotional Harm to Humans

Insufficient attention has been paid to the emotional, psychological, and physical harm to humans that animal cruelty causes. In *People v. Garcia*, the Appellate Division of New York struggled to determine whether New York's anti-cruelty statute could be used to prosecute a defendant who deliberately crushed a nine-year-old's pet goldfish before his eyes.[198] The court's decision appears to have hinged upon the fact that anti-cruelty statutes aim to prevent harm to both the animal and to individuals who have developed emotional ties to the animal as well as potential future harm to humans on the basis of the correlation between cruelty to animals and violence against humans.[199]

Section 48 is uniquely tailored to address each of these concerns. Dog-fighting rings often steal pets for use as bait; not only does the petnapping and brutal slaughter of a beloved companion animal cause severe emotional harm to pet-owners, but where the slaughter is recorded and sold for commercial gain, exploitation of the brutal murder exacerbates the harm to pet-owners just as the *Ferber* Court noted that circulation of child pornography amplifies harm to the victim. Even absent petnappings, viewing such depictions can cause harm to the filmmaker and viewer alike.

v. Decreased Risk of Desensitization to Violence and Exposure to Innocents

According to some commentators, the Government also has an interest in preventing Americans from accessing materials that encourage a lack of respect for life, erode public morality, and desensitize individuals to violence.[200] As Immanuel Kant observed,

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[196] *Id*.
[197] *Id.*
[198] Chiesa, *supra* note 156, at 12 (citing People v. Garcia, 812 N.Y.S.2d 66 (N.Y. App. Div. 2006)).
[199] *See id*.
[200] Kinsella, *supra* note 15, at 379–80 ("Desensitization theory draws support from an increasing body of empirical data. Indeed, over thirty-five years of research suggests a strong link between childhood animal cruelty and adult violent behavior such as domestic abuse and sexual offenses. Considering the potentially extreme consequences of societal indifference to such research, society has a significant interest in preventing animal cruelty. Acting on behalf of society, the government has an equally compelling interest. Section 48 deters

"[c]ruelty to animals is contrary to man's duty to himself, because it deadens in him the feeling of sympathy for their sufferings, and thus a natural tendency that is very useful to morality in relation to other human beings is weakened."[201] At least some empirical evidence suggests that Kant was right. Animal cruelty negatively impacts the person inflicting the harm as well as the viewer.[202] Exposure to brutality, whether in person or by viewing a film, desensitizes viewers to suffering; this may provoke violence because viewers lose their ability to empathize with others.[203] In the absence of Section 48 or its replacement -- the Crush Act -- depictions of animal cruelty would likely have escalated to involve more gruesome killing methods and larger victims, perhaps even infants. After all, early crush videos began with insects and inanimate objects but have evolved to include puppies, kittens, etc.[204] The chilling testimony of a California deputy district attorney reveals that this evolution is already in progress: "We have some stills of a baby doll they're crushing . . . [eventually] buyers will get desensitized and it'll get to be a baby."[205] Without Section 48 to deter filmmakers, one can only imagine what or who the next victim will be.

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human violence by discouraging desensitization of individuals to animal cruelty. By prohibiting the creation, sale, or possession of depictions of animal cruelty, fewer individuals will make and see such depictions. Less exposure theoretically results in fewer persons subject to desensitization. Thus, by concluding the government did not have a compelling interest in preventing animal cruelty, the Stevens court harmed important social policy.")

[201] Ascione & Lockwood*, supra* note 113, at 39.

[202] ASPCA Brief, *supra* note 59, at 18 (citing 145 CONG. REC. H10267, H10271 (statement of Rep. Bachus) ("Psychologists tell us that when we view these activities, they desensitize our young people to a behavior which appears to be a gateway to violent acts of indiscriminate, coldblooded murder."); H.R. REP. NO. 106-397, at 4 (1999) ("If society fails to prevent adults from engaging in this behavior, they may become so desensitized to the suffering of these beings that they lose the ability to empathize with the suffering of humans.")).

[203] *Id*. at 17–18 (citing Reynolds, *supra* note 3, at 349 ("[F]requent exposure [to violence] may desensitize the viewer, decreasing the unpleasant reactions to violence which would normally inhibit violent behavior.") (citing Craig A. Anderson et al., *The Influence of Media Violence on Youth*, 4 PSYCHOL. SCI. PUB. INT. 81, 96 (2003))).

[204] ASPCA Brief, *supra* note 59, at 18 n.38 (citation omitted); Brief of Florida, Alabama, Arkansas, Arizona, California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Montana, New Hampshire, New Mexico, North Carolina, Ohio, Rhode Island, South Caroline, Texas, Utah, Virginia, and West Virginia as Amici Curiae Supporting Petitioners at 1, Unites States v. Stevens, 533 F. 3d 218 (2009) (No. 08-769) at 19 [hereinafter Attorney Generals' Brief].

[205] ASPCA Brief, *supra* note 59, at 18 n.38 (citation omitted).

Given the widespread availability of the Internet, exposure of children to such depictions is virtually unavoidable.[206] However, by criminalizing depictions of animal cruelty and simultaneously reducing their production, Section 48 would have and the Crush Act will likely reduce the risk that children and other innocent viewers will be harmed and disturbed by exposure to these sadistic depictions.[207]

vi. Prevention of Violent Crimes against Humans

Psychologists and law enforcement officials have long recognized the strong link between animal cruelty and violent criminal behavior.[208] Thus, Section 48 was (and its replacement -- the Crush Act -- will hopefully be) an effective crime prevention tool because it could help prevent subsequent crimes against humans and animals committed by depraved viewers of animal cruelty depictions who are so desensitized or aroused by animal torture that they seek to emulate these violent crimes.[209]

An increasing number of research psychologists endorse the existence of a strong causal link between exposure to violence, such as viewing a crush video, and aggressive behavior, particularly in minors.[210] The Meese Commission Report discovered a "strong causal

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[206] For information regarding general Internet regulation, *see generally* Keiser, *supra* note 89, at 785–86 (discussing the Internet's "pervasiveness and its ease of access to children").

[207] *See* H.R. REP. NO. 106-397, at 4 (1999) (discussing the desensitizing impact exposure to crush videos has on viewers).

[208] ASPCA Brief, *supra* note 59, at 11 (citing Randall Lockwood, *Animal Cruelty and Violence Against Humans: Making the Connection*, 5 ANIMAL L. 81, 81 (1999)); TRAINING KEY, *supra* note 85, at 1.

[209] Chiesa, *supra* note 156, at 31 ("There is ample evidence to suggest that individuals who engage in acts of animal cruelty have a greater probability of committing acts of violence against people as compared to individuals who have no history of committing acts of violence against animals.") (citation omitted); Ascione & Lockwood, *supra* note 113, at 40 ("The escalation hypothesis suggests that the presence of cruelty to animals at one developmental period predicts interpersonal violence at a later developmental period. According to this hypothesis, the five-year-old who abuses animals is on the way to becoming an elementary-school bully, aggressive adolescent, and adult violent offender.").

[210] Reynolds, *supra* note 3, at 348; Frank Ascione, *Animal Abuse and Youth Violence*, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin 3–4 (September 2001) [hereinafter *Youth Violence*] (citing research studies indicating that incarcerated men report committing higher rates of animal cruelty: 36% of male sexual homicide perpetrators reported "childhood animal abuse," 46% reported adolescent animal abuse and 36% adult animal abuse; a 1986 study indicated that 48% of rapists and 30% of child

link between exposure to violent pornography and subsequent aggressive behavior," which is particularly relevant since crush videos fulfill violent sexual fetishes.[211] Researchers theorize that the link can be explained in four primary ways: (i) viewers learn violent behavior via imitation and observation; (ii) violent depictions subconsciously "automatize" the viewer's behavior so that the person reacts violently in response to certain stimuli; (iii) recurring exposure to violence desensitizes the viewer, decreasing his or her inhibition to commit violence; and (iv) violent depictions may arouse the viewer, either strengthening his or her reaction to provocation "or causing the viewer to misattribute his state of arousal to the provocation."[212] The Humane Society's First Strike Campaign aims to raise awareness regarding the link between animal cruelty and violent crime.[213] Likewise, the Federal Bureau of Investigation ("FBI") has advised that animal cruelty during childhood is a red flag for later violence against humans. [214]

Research also confirms the existence of a strong link between the commission of animal abuse and violence against humans. In one study, seventy-five percent of those charged with violent crimes had histories of animal cruelty.[215] In 1997 the Massachusetts Society for the

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molesters in a study of 64 male convicted sexual offenders reported "animal abuse in childhood or adolescence." A 1988 study of sexual homicide perpetrators indicated that 40% of participants who reported experience sexual abuse in their youth had committed acts of bestiality.).

[211] Reynolds, *supra* note 3, at 376.

[212] *Id*. at 348–49.

[213] Chiesa, *supra* note 156, at 31 (citation omitted); s*ee generally* Parmenter, *supra* note 164, at 832 ("Studies indicate that there is a strong causal connection between animal abuse and violent crime.") (citation omitted).

[214] ASPCA Brief, *supra* note 59, at 13 n.25 (citing 145 CONG. REC. H10267, H10269 (daily ed. Oct. 19, 1999) (statement of Rep. Gallegly) ("Many studies have found that people who commit violent acts on animals will later commit violent acts on people."); *id.* at H10271 (statement of Rep. Bachus) (noting that an 11-year-old boy with a history of animal cruelty shot ten classmates); Ascione & Lockwood, *supra* note 113, at 81 (discussing the connection between animal cruelty and violence toward humans); CRUELTY TO ANIMALS AND INTERPERSONAL VIOLENCE: READINGS IN RESEARCH AND APPLICATION 82–83 (Randall Lockwood & Frank R. Ascione eds., 1998) (citation omitted); Randall Lockwood & Ann Church, *Deadly Serious: An FBI Perspective on Animal Cruelty,* HUMANE SOC'Y NEWS 1 (Fall 1996) (looking at how the FBI recognizes the connection between animal cruelty and future tendencies for violent behavior toward humans); 145 CONG. REC. H10267, H10271 (statement of Rep. Morella) (quoting FBI Special agent Allan Brantly who stated "'animal violence does not occur in a vacuum. It is highly predictive in identifying children being abused and cases of spousal abuse. . . . In many cases we have seen examples whereby enjoyment from killing animals is a rehearsal for targeting humans.'").

[215] Law Professors' Brief, *supra* note 136, at 18; Kinsella, *supra* note 15, at 383 ("Animal cruelty is a form of antisocial behavior closely correlated to human

Prevention of Cruelty to Animals and Northeastern University conducted a study that compared persons prosecuted for intentional animal abuse against individuals of the same gender, age, socioeconomic status, and geographic location who had not abused animals. The study demonstrated that animal abusers were five times more likely to have been convicted of another violent crime and three times more likely to have been involved in other serious criminal behavior.[216] A 1999 study found that "individuals prosecuted for animal abuse were more likely to have an adult arrest in each of four crime categories [violent, property, drug, or public order offenses] than the comparison group members."[217] Researchers have found that a history of cruelty to animals during childhood is a strong predictor of subsequent "violent offense recidivism."[218]

Survey evidence also supports the conclusion that animal cruelty is a "predictor crime" for subsequent violence against humans.[219] One FBI study found that more than fifty percent of the thirty-five convicted serial killers questioned admitted to torturing animals during childhood.[220] In a 1988 study of thirty-six sexual murderers (twenty-nine were serial killers), thirty-six percent of the serial killers had committed acts of animal cruelty during childhood and forty-six percent had done so during adolescence.[221] As Dr. Randall Lockwood explained, "[a] 10-year study of at-risk children showed that those who were classified at age 6-12 as cruel to animals were more than twice as likely as others in the study to be subsequently referred to juvenile authorities for a violent offense. Of those reported to be both cruel to animals and firesetters, eighty-three percent had later involvement in violent offenses."[222]

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violence.").

[216] ASPCA Brief, *supra* note 59, at 12; Chiesa, *supra* note 156, at 32 ("[A]nimal abusers are five times more likely to commit violent crimes . . . [and] four times more likely to commit property crimes.") (citation omitted).

[217] *Youth Violence*, *supra* note 210, at 5.

[218] *Id*. at 6.

[219] LOCKWOOD, *supra* note 3, at 10 ("Retrospective studies that look backward at the histories of incarcerated serious and violent offenders often reveal a high incidence of animal cruelty offenses in childhood and adolescence. Likewise, prospective studies that follow the offense record of those with a history of animal abuse tend to show a high rate of future offenses against people and property.") (citations omitted); TRAINING KEY, *supra* note 85, at 2; Jennifer Robbins, *Recognizing the Relationship Between Domestic Violence and Animal Abuse: Recommendation for Change to the Texas Legislature*, 16 TEX. J. WOMEN & L. 129, 133 (2006) ("[C]ruelty to animals has been recognized as a warning sign for future interpersonal violence.").

[220] Kinsella, *supra* note 15, at 378–79.

[221] *Id.* at 379.

[222] *Id.*; LOCKWOOD, *supra* note 3, at 10.

Anecdotal evidence also substantiates the link between animal cruelty and future violent crime against humans. Many serial killers, rapists, and other violent criminals committed acts of animal cruelty during childhood.[223] Serial killer David Berkowitz slaughtered a parrot and a dog before he began murdering humans.[224] Cannibal Jeffrey Dahmer impaled dead dog heads on fence posts.[225] Sixteen-year-old Luke Woodham stabbed his mother to death before embarking on a killing spree at his high school, murdering two classmates and injuring seven others. Six months prior to the killing spree, Woodham confided in his journal that he and an accomplice had beaten, burned, and tortured his dog to death. He described the sound of the dog's crushing bones as "'true beauty.'"[226] Teen shooters in Oregon and Colorado also confessed to torturing animals prior to their multiple victim killings,[227] and a 2000 study revealed that five out of eleven participating school shooters had histories of alleged animal cruelty.[228] Had their conduct been punished at the time, perhaps they could have received treatment or remained behind bars, ultimately preventing the murders that ensued.

Sadistic stories ripped from the headlines further illustrate the indisputable link between animal cruelty and violence against humans. In June of 2009, a pet spa owner and alleged animal abuser slit his estranged wife's throat, stabbed her in front of her children, and then committed suicide.[229] He had a history of alleged animal cruelty and was under indictment for the death of Moxie, a beagle, brought to his spa for

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[223] Kinsella, *supra* note 15, at 379; Chiesa, *supra* note 156, at 32 ("Some of the most famous serial killers, including Jeffrey Dahmer, the Son of Sam, the Boston Strangler and Ted Bundy had a history of abusing animals."); Joshua L. Friedman & Gary C. Norman, *Protecting the Family Pet: The New Face of Maryland Domestic Violence Protective Orders*, 40 U. BALT. L.F. 81, 86 (2009) ("The common thread is that all of these individuals committed acts of abuse against animals before turning to human targets."); LOCKWOOD, *supra* note 3, at 10; Ricaurte, *supra* note 5, at 181 ("Studies have shown that children who are cruel to animals are more likely to exhibit aggressive or violent behavior towards humans. In fact, some of the most notorious serial killers, including Jeffrey Dahmer and Ted Bundy, tortured and killed animals in their youth before turning to human victims."); TRAINING KEY, *supra* note 85, at 2 ("There is compelling anecdotal evidence compiled by the FBI and other law enforcement agencies linking serial killers, serial rapists and sexual homicide perpetrators to acts of animal abuse prior to age 25.").

[224] ASPCA Brief, *supra* note 59, at 12 n.22 (citation omitted).

[225] Friedman & Norman, *supra* note 223, at 86.

[226] TRAINING KEY, *supra* note 85, at 2.

[227] Madeline, *supra* note 183, at 326.

[228] *Youth Violence*, *supra* note 210, at 1.

[229] ASPCA Brief, *supra* note 59, at 15 (citing J.J. Stambaugh, *Pet Spa Owner Kills Wife, Self in W. Knox*, KNOXVILLE NEWS SENTINEL CO., June 3, 2009, *available at* http://www.knoxnews.com/news/2009/jun/03/pet-spaowner-kills-wife-self-in-w-knox).

a bath.[230] A veterinary examination of Moxie uncovered an array of injuries from broken ribs to a lacerated liver, which caused internal hemorrhaging.[231] Moxie's slaying spurred the fourth lawsuit arising from mysterious deaths of pets in the spa's care.[232]

Poignant stories of interpersonal violence illustrate the link between animal and human violence. In January of 1996, a woman returned home to find her two parakeets dead.[233] Her angry ex-husband had broken their necks and then roasted them in her oven.[234] She reported the harassment to the police, and eight months later, she was found shot to death.[235] Authorities charged her ex-husband with her murder.[236] Similarly, in Longview, Washington, a woman's ex-boyfriend was charged with felony animal cruelty and misdemeanor assault after he assaulted her and burned her parakeet to death.[237]

As Frank Ascione and Dr. Randall Lockwood explain, animal abuse "may represent a form of rehearsal for the abuse of humans and, if undetected, embolden the perpetrator to believe he can escape both the authorities and the consequences of his acts."[238] The story of serial killer Arthur Bishop illustrates this theory.[239] Bishop kidnapped, tortured, and slaughtered a child.[240] He was so distressed that instead of abducting another child, he tortured fifty puppies to death.[241] Rather than satiating his thirst for blood, however, the animal abuse spurred him to abduct, torture, and murder more children.[242]

While animal abusers are often involved in other crimes, the sale of depictions of animal cruelty and/or the commission of animal cruelty may be the easiest to prove and thus, the likeliest to result in incarceration (at least prior to *Stevens*). Getting the offender off the street for animal cruelty may prevent him or her from committing additional

[230] *Id.*
[231] *Id.*
[232] *Id.* at 15–16.
[233] Caroline Forell, *Using a Jury of Her Peers to Teach About the Connection Between Domestic Violence and Animal Abuse*, 15 ANIMAL L. 53, 62 (2008) (internal citation omitted).
[234] *Id.*
[235] *Id.*
[236] *Id.*
[237] *Id*. at 62–63 (internal citation omitted).
[238] Ascione & Lockwood, *supra* note 113, at 43.
[239] *Id.*
[240] *Id.*
[241] *Id.*
[242] *Id.*

and different crimes toward humans, including property and drug offenses, as well as violent crimes.[243]

Famed anthropologist Margaret Mead once remarked, "[o]ne of the most dangerous things that can happen to a child is to kill or torture an animal and get away with it."[244] Animal cruelty may be the first serious offense for which a juvenile can be prosecuted, providing an opportunity to intervene at a pivotal stage in development that may prevent the juvenile from committing subsequent crimes against humans.[245] Perhaps not surprisingly, because animal cruelty may be symptomatic of psychological disturbance or conduct disorders that could lead to other crimes,[246] several states mandate psychological assessments of juveniles convicted of animal cruelty.[247]

vii. Enhanced Detection and Prevention of Domestic Violence

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[243] *See* LOCKWOOD, *supra* note 3, at 10 ("[D]uring a 10-year window surrounding an arrest for intentional acts of animal abuse[, t]he offense rates of animal abusers [for other crimes] were up to five times higher than those seen in non-abusing individuals who were matched on age, gender, race and area of residence. Such studies support the popular notion that perpetrators of animal cruelty are likely to be involved in many and varied offenses. Often the animal cruelty offenses will be among the easiest to prove and may potentially carry some of the most serious consequences for the offender."); Rosa, *supra* note 181, at 296–97 (suggesting that the primary impetus for New York enacting two new animal cruelty laws was the link between animal cruelty and violence against humans, particularly school shootings).

[244] Susan Crowell, *Animal Cruelty as It Relates to Child Abuse: Shedding Light on a "Hidden" Problem*, 20 J. JUV. L. 38, 43 (1999) (internal citation omitted).

[245] LOCKWOOD, *supra* note 3, at 13.

[246] *See id.*, at 10; TRAINING KEY, *supra* note 85, at 2 ("One survey of psychiatric patients who had reportedly tortured dogs and cats found that all of the subjects had high levels of aggression against people, including one patient who had murdered a boy.") (internal citation omitted). Since the late 1980s, animal cruelty has been listed in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* as a symptom of conduct disorders. Kinsella, *supra* note 15, at 381; LOCKWOOD, *supra* note 3, at 13; *Youth Violence*, *supra* note 210, at 4–5.

[247] Ascione & Lockwood, *supra* note 113, at 47–48 ("Since 1998 California has required such assessment in all cruelty-to-animals convictions. Colorado law requires assessment and recommends treatment; New Mexico mandates counseling in cases of animal abuse by juveniles and recommends it for adult offenders. In the last decade, more than a dozen other states have added counseling and treatment as a sentencing option within their cruelty-to-animals codes.").

Animal cruelty is a particularly strong indicator of domestic violence,[248] including elder and child abuse.[249] As Representative Morella noted during legislative debate on Section 48:

> My experience in working on domestic violence issues alerted me to the connection between animal abuse and violent behavior . . . . Abusers often threaten to harm or inflict pain to the animal to demonstrate control within

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[248] *See generally* Robbins, *supra* note 219; Naseem Stecker, *Of Interest: Domestic Violence and the Animal Cruelty Connection*, 83 MICH. B.J. 36 (2004).

[249] *See* ASPCA Brief, *supra* note 59, at 16 (citing Frank R. Ascione, *Domestic Violence and Cruelty to Animals*, 17 THE LATHAM LETTER 1 (1996); Domestic Violence Intervention Project, *Domestic Violence Program*, http://alexandriava.gov/DomesticViolence (last visited June 13, 2009) ("Family abuse crosses all categories, even the family pet. Animal cruelty is often an early warning sign of violent tendencies that may turn into domestic violence."); Barbara Rosen, *Watch for Pet Abuse—It Might Save Your Client's Life*, *reprinted in* CRUELTY TO ANIMALS AND INTERPERSONAL VIOLENCE: READINGS IN RESEARCH AND APPLICATION 340–47 (Randall Lockwood & Frank R. Ascione eds., 1998) (detailing the link between animal abuse and elder abuse); ASPCA, *The Connection Between Domestic Violence and Animal Cruelty*, *available at* http://www.aspca.org/fight-animal-cruelty/domestic-violence-and-animal-cruelty.html [hereinafter *The Connection*] (looking at the link between domestic violence and animal cruelty and discussing studies that suggest a strong correlation) (last visited June 13, 2009)); *see also* Crowell, *supra* note 244*;* Friedman & Norman, *supra* note 223, at 81 ("There is a demonstrated link between acts and offenses of domestic violence and animal abuse. Domestic abusers often do not think twice about beating or otherwise harming pets that have bonded with the other spouse in order to control, coerce, intimidate, or cause emotional harm to that spouse."); LOCKWOOD, *supra* note 3, at 11 ("Paying attention to the victimization of animals can often lead to the discovery of people who have been harmed by the same perpetrator, or who are at high risk of being harmed. Animal cruelty investigators and humane law enforcement agents are now seen as important sentinels for detecting many forms of abuse, and in some states are key mandated reporters of suspected child and elder abuse."); TRAINING KEY, *supra* note 85, at 3 ("Perpetrators [of elder abuse] are the children or grandchildren of the elderly victim and may abuse the elder's pet as a form of retaliation, out of frustration over their caretaking responsibilities or to extract financial assets from the victim."); Ascione & Lockwood, *supra* note 113, at 46–47; *Youth Violence*, *supra* note 210, at 9 (stating that in a 1998 study of 38 battered women, 71% of those with pets said that their partners had threatened, hurt, or killed at least one of their pets); Randall Lockwood, Ph.D., *Wounded Hearts: Animal Abuse and Child Abuse*, AV MAGAZINE, Winter 2000, at 17 [hereinafter *Wounded Hearts*] ("Veterinarians are mandated reporters of . . . suspected elder abuse in Illinois."); Robbins, *supra* note 219; Stecker, *supra* note 248, at 36 (quoting prosecutor Gail Benda, who said, "I've seen over the 17 years that I've been a prosecutor that there's a very strong link between other violence and animal cruelty and abuse. To me it's just absolutely proven.").

> the home . . . . Raising awareness about the link between animal cruelty and domestic violence, child abuse and other forms of violent behavior I think is an important step in trying to prevent such violence.[250]

Research supports the existence of a strong link between animal cruelty and domestic violence. A Utah study revealed that "71% of pet-owning victims in a domestic violence shelter reported that their abuser had threatened, harmed, or killed an animal."[251] Another study indicated that 80% of surveyed pet owners at twelve domestic violence shelters reported that their abusers had exhibited violence toward their pets.[252] Comparing 101 women surveyed in shelters to an equal number of women who had not been abused by their partners, battered women were roughly eleven times likelier to report that their partners had physically abused a pet.[253] In a 2004 study, 53% of participants indicated that their abusive spouses physically abused their pets.[254] The study also revealed:

> Of those families where pet abuse had occurred, 48% of the respondents reported it occurred "often" during the past [twelve] months and another 30% reported that abuse to the family pet had occurred 'almost always' during the past [twelve] months. Victims whose pets had been abused reported that abuse to the family pets occurred an average of 51% of the time violent outbursts had taken place over the past year.[255]

Pets and service animals may also serve as tools to perpetrate domestic violence. For instance, abusers may force victims and pets to commit bestiality.[256] In the presence of animal abuse, "the chance of domestic violence lethality generally increases."[257] As such, prosecuting perpetrators of animal cruelty could perhaps prevent or reduce incidents of domestic violence.[258]

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[250] 145 CONG. REC. H10271 (daily ed. Oct. 19, 1999) (statement of Rep. Morella).
[251] ASPCA Brief, *supra* note 59, at 16 (citing Frank R. Ascione, *Domestic Violence and Cruelty to Animals*, 17 THE LATHAM LETTER 1 (1996)).
[252] *Id.* (internal citation omitted); TRAINING KEY, *supra* note 85, at 2.
[253] Forell, *supra* note 233, at 56 (internal citation omitted).
[254] *Id*.
[255] *Id*.
[256] Friedman & Norman, *supra* note 223, at 85 (internal citation omitted).
[257] *Id.*
[258] For a general discussion of the severity of the problem of domestic violence in America, *see id.* at 82–83 ("Domestic violence can happen to people of all ages, races, ethnicities, religions, socioeconomic classes, and professions. The statistics, which reflect how disproportionately domestic violence affects women, are overwhelming. 'One in every four women will experience domestic

Fear of pet abuse often deters victims from escaping abusers.[259] In the 2004 study referenced above, "48% of the battered women reported that they delayed leaving out of fear for the welfare of their pets. Of those situations where the batterer had previously abused a pet, 65% of the battered women delayed leaving out of concern for their animals."[260] Other research reveals that "18–48 percent of battered women have delayed leaving an abusive home, or have returned to their batterer, out of fear for the welfare of their pets or livestock."[261] A 2000 study indicated that 44% of participants had partners who had abused or killed companion animals and 43% stated that concern for their pets' welfare prevented them from leaving sooner.[262] In a disturbing illustration of

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violence in her lifetime.' 'Eighty-five percent of domestic violence victims are women.' 'Over fifty percent of all women will experience physical violence in an intimate relationship,' and twenty-four to thirty percent of those women will experience regular and on-going domestic violence. The majority of domestic violence cases, unfortunately, are also never reported to law enforcement. Additionally, the cost of domestic violence exceeds $5.8 billion each year. To rectify this issue, 'all fifty states now have a version of the civil protection order, which mandates both court and law enforcement participation in instances where persons eligible for relief are in fear of harm.'") (internal citations omitted).

[259] ASPCA Brief, *supra* note 59, at 16–17 ("Research has also shown that fear of pet abuse is a major factor in preventing victims from escaping their abusive environments.") (internal citation omitted); Friedman & Norman, *supra* note 223, at 87 ("The bond of a victim with his or her pet or service animal may hinder that victim's ability to seek and acquire help. Victims are unlikely to flee domestic violence for safe harbor, such as a women's shelter, if they must leave pets or service animals in their wake."); TRAINING KEY, *supra* note 85 (citing a 1997 Utah study of victims in domestic violence safehouses, which revealed "72 percent of pet-owning victims reported that their abuser had threatened, harmed, or killed family pets. Researchers also asked victims whether they had delayed leaving their abusive situation out of fear for their pets' safety and found nearly 20 percent had delayed leaving the relationship because of the pet abuse."); Robbins, *supra* note 219, at 129–30 (giving examples of partners who threatened pet abuse to control their partners).

[260] Forell, *supra* note 233, at 56–57 (internal citation omitted).

[261] Friedman & Norman, *supra* note 223, at 87 (citing Allie Phillips, *The Few and the Proud: Prosecutors Who Vigorously Pursue Animal Cruelty Cases*, 42 PROSECUTOR 20, 21 (Jul.-Sept. 2008) ("The actual killing, torturing and beating of pets -- or the threat of such actions -- is used by abusers as a weapon to ensure submission and silence by women and children."); *see also* Dianna J. Gentry, *Including Companion Animals in Protective Orders: Curtailing the Reach of Domestic Violence*, 13 YALE J.L. & FEMINISM 97, 102 (2001) ("It is because of this relationship with animals that abusers readily have the ability to exercise control over domestic violence victims through their pets.").

[262] TRAINING KEY, *supra* note 85, at 2–3; *see also* Ascione & Lockwood, *supra* note 113, at 45 (citing a Department of Justice report, in which 9% of female respondents and 6% of male respondents reported that stalkers had murdered or threatened to kill pets).

such coercive animal abuse, a battered wife returned to her abuser after he mailed photographs to her, which showed him cutting off her dog's ears with gardening shears.[263] He also mailed the ears.[264] Perhaps the most disturbing illustration of coercive animal cruelty comes from Salt Lake City, where a woman alleged that her abusive husband hanged their pet rabbit and began skinning it alive in front of her and their child; as the animal shrieked in agony, he held the baby next to it and remarked, "See how easy it would be?"[265]

As two commentators explain, "abusers realize their intended goal by viciously dominating the life of their victim through the threat of harm to a beloved pet or service animal. This course of action instills insecurity and terror in the victims."[266] Congress has also recognized that "women in domestic violence shelters [often] report that their abusers victimize the family pet in order to control their behavior or the children's behavior."[267] Accordingly, animal shelters and battered women's shelters should join forces to care for battered women and their pets.[268] This holistic, interdisciplinary approach is also important because pets "furnish solace, emotional support, and assistance to victims of domestic violence" and "allow for personal exercise and opportunities to search for escape routes."[269]

viii. Enhanced Detection and Prevention of Child Abuse

The strong correlation between animal cruelty and child abuse is also undeniable.[270] A 1983 New Jersey study indicated that out of 53 families where "substantiated child abuse and neglect" had occurred, 60% also possessed abused or neglected pets, and "[a]nimal abuse was significantly higher (88 percent) in families where child physical abuse

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[263] Robbins, *supra* note 219, at 129 (citing Jane Ann Quinlisk, *Animal Abuse and Family Violence*, *in* CHILD ABUSE, DOMESTIC VIOLENCE, AND ANIMAL ABUSE 168, 168 (Frank R. Ascione & Phil Arkow eds., 1999)).
[264] *Id.*
[265] Crowell, *supra* note 244, at 42 (citing Frank R. Ascione, *Battered Women's Reports of Their Partners' and Their Children's Cruelty to Animals*, 1 J. EMOTIONAL ABUSE 119, 130 (1998) (internal citation omitted)).
[266] Friedman & Norman, *supra* note 223, at 86 (internal citation omitted).
[267] ASPCA Brief, *supra* note 59, at 17 (citing 145 CONG. REC. H10271, *supra* note 250); *see also* Friedman & Norman, *supra* note 223, at 81; Robbins, *supra* note 219, at 129, 134–37.
[268] Forell, *supra* note 233, at 61 ("[T]oday many communities have both battered women's and animal shelters. It is not uncommon for women's shelters to work closely with animal shelters to provide care for a battered woman's animal companions, thereby making it easier for battered women with pets to leave their abusers.").
[269] Friedman & Norman, *supra* note 223, at 84–85.
[270] TRAINING KEY, *supra* note 85, at 3; Ascione & Lockwood, *supra* note 113, at 46 (listing studies); *see generally* Robbins, *supra* note 219.

was present than in families where other forms of child maltreatment (*e.g.*, sexual abuse) occurred (34 percent)."[271]

Anecdotal evidence supports the existence of this correlation. In Ohio, for example, police conducted an animal cruelty investigation of a home where neighbors reported seeing dead kittens on the front porch.[272] During the investigation, the police found additional cats in deplorable conditions as well as two young children covered in feces and urine who were locked in a bedroom.[273] After a dog died when its owner taped a toy inside its mouth with packaging tape to prevent it from barking, Michigan Humane Society workers discovered that the same woman had been seen beating her children and had been the subject of prior complaints with Child Protective Services.[274] A man who shot his dog in front of his family because the dog had ruined a window covering was under investigation for child abuse at the time of the shooting.[275]

Abusers often discourage children from reporting abuse by threatening to harm or kill their beloved pets.[276] By way of illustration, according to one commentator, a man charged with lewd conduct and rape of his daughter and half-sister prevented them from reporting the abuse by threatening to kill them and by slaughtering animals in front of them.[277] In another example, a man sexually abused his seven-year-old adopted daughter and her schoolmate during a camping trip, but his victims did not report the abuse in part because he threatened to harm the family pet and subjected it to physical abuse.[278] Abusers may also force child victims to perform sexual acts with pets or force them to wound or murder their favorite pet to compel them to keep the abuse a secret.[279]

Compulsory participation in or witnessing animal abuse is not uncommon and can have extremely negative consequences on a child's development.[280] As one commentator explained:

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[271] *Youth Violence*, *supra* note 210, at 8.
[272] TRAINING KEY, *supra* note 85, at 1.
[273] *Id.*
[274] Crowell, *supra* note 244, at 39-40.
[275] *Id*. at 40.
[276] *Id.* at 41; Robbins, *supra* note 219, at 129–130 (Robbins recounts the story of a child whose mother's boyfriend sexually abused her and who abused animals in front of her in an attempt to prevent her from reporting the abuse. He also threatened to abuse her dog, Dusty, if she reported him.); TRAINING KEY, *supra* note 85.
[277] Crowell, *supra* note 244, at 41.
[278] *Id.*
[279] TRAINING KEY, *supra* note 85, at 3.
[280] *Wounded Hearts*, *supra* note 249, at 4–5; Robbins, *supra* note 219, at 135.

> If children witness a pet being intentionally harmed, it damages any sense of safety and confidence in the ability of adults to protect them from harm . . . [T]hey learn that it is normal to be threatened and hurt by those you love and who claim to love you . . . [C]hildren who are the victims of abuse may seek to re-enact the abuse they have suffered by repeating these behaviors on other victims who are weaker and more vulnerable than themselves . . . [and are] at high risk of establishing life-long patterns of violent behavior. For many children the pain of empathy for animals that have been abused by other family members teaches them that such kindness and sensitivity must be suppressed. Some of these children may still love their pets but kill them in a desperate attempt to have some control over what they see as an inevitable fate for the animal. Others may abuse their own pets to assure themselves and others that their own caring has been stifled and that continuing exposure to the abuse of those they love cannot hurt them any more. In some cases the child becomes insensitive not only to the feelings of others, but to his or her own feelings. Such children may test the limits of their own desensitization through attempting to cut, burn or mutilate themselves.[281]

A 2004 study revealed that "61% of the women reported that their children had witnessed animal abuse . . . [C]hildren of women in battered women shelters were 'twenty times more likely to have witnessed pet abuse than children from a control group.'"[282] In one case, a woman reportedly shot her batterer when he attempted to force her to hold down a puppy while he had sex with it.[283] A biography of Wayne Dresbach, who murdered his parents at age fifteen, states that when his abusive father was angry about the birth of a new litter of kittens, he piled them into a sack and walked to the creek.

> At the creek [his father] rolled the top of the bag tight, then tossed it into the shallow water. While the kittens screeched, and pawed to get out, and Wayne sobbed for him not to do it, his father took aim and emptied the rifle . . . Wayne wanted to bury the kittens, but [his father] told him not to bother. Dogs and buzzards would take care of them.[284]

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[281] *Wounded Hearts*, *supra* note 249, at 4–5.
[282] Forell, *supra* note 233, at 56, 57 (citation omitted).
[283] Robbins, *supra* note 219, at 130 (citation omitted).
[284] *Id.*

Perhaps it is no surprise that Mr. Dresbach ultimately became a murderer himself.[285]

Exposure to domestic violence during childhood may cause a vast array of other negative consequences, including but not limited to "stuttering, headaches, stomachaches, asthma, bed-wetting, suicidal behavior, clinging behavior, aggressive behavior, passivity, insomnia, phobias, withdrawal, anxiety, or depression."[286] Yet the impact of domestic violence on a child's personality and emotional development is perhaps more disturbing than its physical symptoms. Children exposed to domestic violence are reportedly three times more likely to commit animal cruelty, perhaps due to their desensitization to violence or inability to empathize with victims.[287] A 1992 study indicated that sexually abused children were "significantly more likely" to commit animal cruelty than non-abused counterparts.[288] In a 1983 study of "fifty-three families being treated by New Jersey Family Services because of incidents of child abuse," 88% of the families reported pet abuse; abusive parents were responsible for roughly 66% of the abuse, but children were the animal abusers in the remaining cases.[289] For this reason, taking animal cruelty seriously may not only protect animals but may also unearth and put a stop to child abuse.

Awareness of the link between human and animal cruelty spurred Congress to enact Section 48. Section 48 reflected "a growing awareness . . . that violence perpetrated on animals is unacceptable and often escalates to violence against humans . . . It is essential that our society recognizes this link and punishes acts of animal cruelty."[290] Accordingly, Congress passed the following resolution, acknowledging the undeniable link between early animal abuse and subsequent brutality against humans:

> [T]he Congress (1) recognizes that individuals who abuse animals are more likely to commit more serious violent crimes against humans; (2) urges social workers, teachers, mental health professionals, and others to be aware of the connection between animal cruelty and human violence and to evaluate carefully and to monitor closely individuals who have a history of abusing

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[285] Crowell, *supra* note 244, at 42.
[286] Robbins, *supra* note 219, at 135.
[287] Friedman & Norman*, supra* note 223, at 86, 87.
[288] *Youth Violence*, *supra* note 210, at 8.
[289] Crowell, *supra* note 244, at 40; TRAINING KEY, *supra* note 85, at 3 ("Similarly, the 1995 study of domestic violence victims entering shelter in Utah noted that 32 percent of the pet-owning victims reported that one or more of their children had hurt or killed a pet.").
[290] ASPCA Brief, *supra* note 59, at 13 (citation omitted).

> animals because this may indicate a propensity to commit violence against other humans; (3) urges appropriate Federal agencies to encourage and support research to increase the understanding of the connection between cruelty to animals and violence against humans in order to utilize instances of animal abuse to identify and intervene with potentially violent individuals, and urges Federal agencies which are undertaking research on violent crime and its causes to incorporate examination of the link between violence against animals and violence against humans; (4) urges local law enforcement officials to treat cases of animal cruelty seriously both because such cruelty is a [sign] of the potential for domestic and other forms of violence against humans; and (5) commends the fine work of local animal control officials and humane investigators who enforce laws against animal abuse and urges these professionals to work more closely with local law enforcement personnel to identify and prevent potential violence against humans.[291]

For all of the foregoing reasons, the prevention of animal cruelty clearly constitutes a compelling government interest.

b. Depictions of animal cruelty are "intrinsically related" to underlying crimes

Turning to the second *Ferber* factor, the Third Circuit erroneously held that the depictions prohibited by Section 48 were not intrinsically related to underlying crimes of animal cruelty.[292] While the Majority never addressed the Third Circuit's finding, Justice Alito rejected it,[293] noting that the "most important factor" in support of classifying child

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[291] *Id.* at 14–15 (citing H.R. CON. RES. 338, 106th Cong. (2000)).

[292] *Id.* at 18 (citing 145 CONG. REC. H10267 at 16 (statement of Rep. Bachus). In *Ferber,* the Court noted that child pornography was intrinsically related to the sexual abuse of children because it created a permanent record of the abuse, thereby, exacerbating the harm and because closing the distribution network for child pornography was necessary to control its production. New York v. Ferber, 458 U.S. 747, 759 (1982).

[293] United States v. Stevens, 130 S. Ct. 1577, 1599 (2010) (Alito, J., dissenting) ("The videos record the commission of violent criminal acts, and it appears that these crimes are committed for the sole purpose of creating the videos. In addition, as noted above, Congress was presented with compelling evidence that the only way of preventing these crimes was to target the sale of the videos. Under these circumstances, I cannot believe that the First Amendment commands Congress to step aside and allow the underlying crimes to continue.").

pornography as unprotected speech was that the speech involved the commission of crimes against children.[294] Likewise, depictions of animal cruelty do more than exacerbate the harm to animals; their creation and sale are often its direct cause.

Because committing crime is necessary to create depictions of animal cruelty, [295] Section 48 was an effective crime-prevention tool. Section 48's prohibition of the creation, sale, or possession of depictions of animal cruelty likely eliminated or at least reduced the demand for the underlying acts of torture; if the film could not be sold for a profit without risk of criminal prosecution, then what filmmaker would expend the time, money, and effort to create the film, especially when he or she will be unable to earn a profit? This is especially true with regard to made-to-order videos that allow purchasers to specify the victim and method of torture.[296] Without the promise of significant financial gain, the filmmaker is far less likely to commit the other crimes necessary to produce the film, including but not limited to the murder itself. By criminalizing one action, Section 48 also effectively prevented the commission of other crimes.

Animals in these depictions experience unimaginable physical and psychological trauma solely for profit.[297] Victims featured in crush videos are slowly ground into a bloody pulp; the length of torture could be prolonged or the killing method made more agonizing to capture "better" footage or to fulfill a depraved customer's specific fantasy. During debate on Section 48's enactment, viewers described one crush video as follows: "[t]he little animal was literally pinned down on the floor as this woman took a high-heeled stiletto shoe, talking vulgar language to it, slowly crushing each of its limbs, listening to its sound on the audio, and working her way to the final death of that animal before . . . the animal was literally crushed into the ground over a period of 10 or 12 minutes."[298] Some films last two hours.[299]

Similarly, a dog-fighting video requires a dog-fight. Yet, dog-fighting is illegal in every state. Additionally, fighting dogs suffer a lifetime of abuse.[300] Puppies are beaten to condition them to violence.[301]

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[294] *Id.* at 1599.
[295] ASPCA Brief, *supra* note 59, at 23–25 (citation omitted).
[296] *Id.* at 24.
[297] *Id.* at 25 (citation omitted).
[298] 145 CONG. REC. H10267 (daily ed. Oct. 19, 1999) (statement of Rep. McCollum).
[299] *Punishing Depictions*, *supra* note 98 (statement of William Paul LeBaron, detective, Long Beach Police Department) ("I have watched over 50 videos ranging in length from 10 minutes to 2 hours.").
[300] ASPCA Brief, *supra* note 59, at 29.
[301] *Id.*

"The nearly $500 million a year enterprise is extremely abusive, 'when dogs are young, they place them in a sack and beat them. The sack is later opened in front of a cat or small dog, which is attacked so the "fighter" gets a taste of blood.'"[302] According to one source, as part of "training," an owner forced a puppy to fight against a mature fighting dog.[303] Another report indicated that a fighting dog seized after its owner's arrest possessed over a thousand wounds.[304]

The life of a fighting dog is all discipline and no affection. Fighting dogs "are forced to run on a treadmill several hours per day and strengthen their jaws with spring poles. Weights affixed to chains are dangled from their necks to build strength, and owners run them with weights attached; dogs are often *permanently* chained this way." [305] Forced to fight to the death, battered dogs drugged with steroids,[306] weight-gain supplements,[307] and controlled substances (including speed and cocaine)[308] are literally torn apart by opponents. Because of the monetary and reputational harms that ensue from a loss, "[t]he end result, if the losing dog survives the fight, is immediate death, if he is lucky, or torture and mutilation if the owner is embarrassed or irate."[309] In the exceptional instances when a losing dog survives a fight, its angry or embarrassed owner may abandon, electrocute, shoot, or torture the dog.[310] Injured winners may also suffer a terrible fate. "Owners often refuse to take injured dogs to veterinarians for fear that their crimes will be" reported, and injured survivors may still die from the substandard veterinary care their incompetent owners provide.[311]

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[302] *Id.* at n.52.

[303] Doug Simpson, *Internet Unleashes US Dogfight Craze*, THE SYDNEY MORNING HERALD (Jan. 15, 2004), *available at* http://www.smh.com.au/articles/2004/01/14/1073877889804.html).

[304] Lori Huoy, *Underground Magazine Leads Suspects to Officials*, WPXI (July 26, 2004), *available at* http://www.wpxi.com/news/3579417/detail.html.

[305] ASPCA Brief, *supra* note 59, at 29 (citation omitted).

[306] *Id.* at 30 (citation omitted).

[307] *Id.*

[308] *Id.*

[309] *See* Gibson, *supra* note 124.

[310] ASPCA Brief, *supra* note 59, at 30 (citation omitted); Simpson, *supra* note 303 ("The loser may be nursed back to health, if valuable, or it may be shot or abandoned."); United States v. Stevens, 130 S. Ct. 1577, 1602 (2010) (Alito, J., dissenting) ("For these dogs, unlike the animals killed in crush videos, the suffering lasts for years rather than minutes.").

[311] ASPCA Brief, *supra* note 59, at 31 (citing Christine Haines, *Pennsylvania, PA: Dog fighting Probe Produces Two Warrants*, HERALD-STANDARD (July 27, 2004) (noting that in some states, "licensed veterinarians must report suspected dog fighting . . . [so] owners of fighting dogs do their own doctoring"); 720 ILL. COMP. STAT. ANN. 5/26-5 (2010) ("Any veterinarian in this State who is presented with a dog for treatment of injuries or wounds resulting from fighting

Section 48 prohibited materials intrinsically related to animal cruelty because the film's creation is predicated on the commission of multiple crimes in addition to animal cruelty.[312] To film a dog-fight, the filmmaker must attend the fight, which is illegal in some states.[313] As Justice Alito observed, "some dogfighting videos are made 'solely for the purpose of selling the video (and not for a live audience),'" which means that the cruelty would never have occurred but for the creation and sale of the film.[314]

By criminalizing depictions of illegal animal cruelty, Section 48 and now the Crush Act promote and preserve public morality and simultaneously prevent, or at least reduce, the commission of related

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where there is a reasonable possibility that the dog was engaged in or utilized for a fighting event for the purposes of sport, wagering, or entertainment shall file a report with the Department of Agriculture and cooperate by furnishing the owners' names, dates, and descriptions of the dog or dogs involved."); LOCKWOOD, *supra* note 3, at 25–26 ("Several states mandate that veterinarians report animal cruelty, including suspected dogfighting activity, to the appropriate authorities. Many other states encourage veterinarians to report suspected animal cruelty by granting immunity to those who make good-faith reports to the appropriate agencies. Such reporting is supported by professional veterinary organizations including the American Veterinary Medical Association (AVMA) and the American Animal Hospital Association (AAHA). The AAHA position statement on reporting, revised in 2003, states: 'Since veterinarians have a responsibility to the welfare of animals and the public and can be the first to detect animal abuse in a family, they should take an active role in detecting, preventing and reporting animal abuse. While some states and provinces do not require veterinarians to report animal abuse, the association supports the adoption of laws requiring, under certain circumstances, veterinarians to report suspected cases of animal abuse. Reporting should only be required when client education has failed, when there is no likelihood that client education will be successful, or in situations in which immediate intervention is indicated and only when the law exempts veterinarians from civil and criminal liability for reporting.'"); *Youth Violence*, *supra* note 210, at 10 (Minnesota and West Virginia require veterinarians to report suspected animal abuse.).

[312] *See, e.g.*, Gibson, *supra* note 124 (discussing the crime of dog-fighting); Dean Schabner, *Arrest Called Break in Dog Fight Effort*, ABC NEWS (Apr. 29, 2003) (detailing a NY arrest made in connection with animal cruelty and dogfighting); *Leashing a Blood Sport,* WASH. TIMES, Jan. 13, 2004, *available at* http://www.washingtontimes.com/news/2004/jan/12/20040112-115320-5139r/print ("Dogfighting is illegal in all states and a felony in 47, but the activity is on the rise.").

[313] ASPCA Brief, *supra* note 59, at 5 (citation omitted); 720 ILL. COMP. STAT. ANN. 5/26-5 (2010) (making it illegal to knowingly attend a dog-fight); TEX. PENAL CODE § 42.10 (2009) (same).

[314] *Stevens*, 130 S. Ct at 1601 (Alito, J., dissenting).

crimes against humans -- including gambling, drug and weapons trafficking, murder and other crimes.[315] As one commentator explained:

> Dog-fighting is an insidious underground organized crime and all dog fighters, regardless of their level, embrace many peripheral crimes and gang activities including drug dealing and consumption, gambling, theft, and violence against humans . . . . Many recent dog fighting raids, include those in Flint, MI (2003), Buffalo, NY (2004), Port St. Lucie, FL (2004), Jones County, GA (2004), and Oklahoma City, OK (2004), have resulted in the infiltration of major drug distribution networks, and the arrest of the drug kingpins who regularly organized and attended the dog fights . . . . Fighting dogs are clandestine security devices for drug traffickers. Drugs are often stashed in containers to which the dogs are chained in yards or vacant fields. The dogs also provide excellent security inside drug houses and warehouses. Where once the presence of dogs was utilized as an overt warning to potential invaders, it is now increasingly common for criminals to have the dogs debarked (vocal cords severed), to act as silent alarm and attack systems against unsuspecting invaders. The presence of the silent killers poses a significant threat to law enforcement personnel entering these premises . . . . Criminals also use dog-fighting to yield large profits through illegal gambling.[316]

As such, criminalizing those who participate in and encourage dog-fighting may prevent related crimes against humans, including "drug offenses, gang activity, weapons violations, sexual assault, and domestic

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[315] *Id.* at 1601 ("[T]hose who stage dogfights profit not just from the sale of the videos themselves, but from the gambling revenue they taken in from the fights; the videos 'encourage [such] gambling activity because they allow those reluctant to attend actual fights for fear of prosecution to still bet on the outcome.'") (citing Brief of the Center on the Administration of Criminal Law as Amicus Curiae in Support of Petitioner 12 ("Selling videos of dogfights effectively abets the underlying crimes by providing a market for dogfighting while allowing actual dogfights to remain underground."); Kinsella, *supra* note 15, at 370–72 (discussing whether the Secondary Effects Doctrine applied to Section 48); Ricaurte, *supra* note 5, at 188 ("In the case of dogfighting, the main revenue generator is the gambling and sale of illegal drugs, activities which are associated with dogfighting.").

[316] Gibson, *supra* note 124; *see also Stevens*, 130 S. Ct. at 1601 (Alito, J., dissenting) ("dogfight videos are very often produced as part of a 'low-profile, clandestine industry' and 'the need to market the resulting products requires a visible apparatus of distribution'") (citing New York v. Ferber, 458 U.S. 747, 760 (1982)); LOCKWOOD, *supra* note 3, at 20.

violence."[317] As Dr. Randall Lockwood explains, animal cruelty "cases are often easier to prosecute . . . since the effects of the crime on the victim may be easier to document and the intentionality of the offense is more clearly recognized."[318]

Not surprisingly, Attorney Generals of numerous states filed amicus briefs in support of Section 48. They argued that Section 48 strengthened law enforcement efforts to deter and enforce state anti-cruelty laws by prohibiting perpetrators (and distributors) from advertising, selling, and profiting from animal cruelty depictions in any market.[319] Striking the Crush Act would severely undermine such efforts by allowing perpetrators to openly profit from their involvement in violent and depraved crimes.[320] Existing anti-cruelty laws have generally required perpetrators to be caught in the act of animal cruelty; this method is ineffective in light of sophisticated organizations that commercialize animal cruelty.[321] Section 48 and its successor legislation have filled that crucial gap in the law to better guarantee that crime will not pay.[322]

c. Advertising and selling the speech provides an economic motive for and are thus integral to its production

As the drafters of the Crush Act acknowledge, advertising and selling depictions of animal cruelty provide a major economic motive for and are the main incentive for their production.[323] Due to the highly secretive nature of this industry, the most effective way to end the underlying acts of cruelty is to target filmmakers and prevent them from profiting from their instigation of and participation in violent crime.[324]

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[317] LOCKWOOD, *supra* note 3, at 20.
[318] *Id.*
[319] Attorney Generals' Brief, *supra* note 204, at 1; *Stevens*, 130 S. Ct. at 1600–01 (Alito, J. dissenting) ("Section 48's ban on trafficking in crush videos also helps to enforce the criminal laws and to ensure that criminals do not profit from their crimes.").
[320] Attorney Generals' Brief, *supra* note 204, at 2.
[321] *Id.* at 5.
[322] *Id.* at 4–6. It is no defense to argue that the underlying acts of animal cruelty would still occur regardless of Section 48 because the same can be said of child pornography and many other criminal laws. The mere fact that a law cannot prevent every act it criminalizes is insufficient to warrant invalidating it. *See* HSUS Brief, *supra* note 100, at 20 (explaining that the Third Circuit erroneously labeled Section 48 "underinclusive," but Congress was merely respecting potential limits on congressional powers).
[323] ASPCA Brief, *supra* note 59, at 33 n.61.
[324] *Punishing Depictions, supra* note 98 (statement of William Paul Lebaron, detective, Long Beach Police Department); *Stevens*, 130 S. Ct. at 1598–1600 (Alito, J., dissenting); Reynolds, *supra* note 3, at 386 ("[H]alting distribution is necessary to halt production of animal cruelty videos because of the difficulty in prosecuting the actual offenders.").

Crush videos enjoy a large audience, and a single video sells for up to $300; annual sales total nearly $1 million.[325]

Animal fighting is also lucrative.[326] As one commentator noted, "[d]og-fighting is an incredible source of income for gangs and drug traffickers. In fact, the average dog fight could easily net more money than an armed robbery, or a series of isolated drug transactions."[327]

Dog-fighting videos perpetuate animal cruelty by promoting illegal dog-fighting and increasing the profitability and value of fighting dogs and their issue. A "Grand Champion"[328] commands substantially higher side bets, purses, entry fees, stud fees, and sale price -- up to $10,000 -- than a "Champion."[329] Puppies of Grand Champions may sell for $1500 apiece.[330] Because written certification of a dog's success rate is difficult to verify and easily faked, a film is the best way to memorialize a dog's status and to showcase its fighting style to potential purchasers and breeders.[331] Because a dog's value and profitability hinge on its "kill rate," dog-fighting videos enable owners to profit from their crimes.

Speaking in support of Section 48, one Congressman remarked, "[t]he most effective way of stopping this trade is by getting to the people who are distributing the product and making a profit."[332] He

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[325] ASPCA Brief, *supra* note 59, at 9 (citing *Punishing Depictions*, *supra* note 98) (stating that a video typically sells for $40 to $45; made-to-order videos sell for up to $300 apiece; one video distributor had pending orders totaling $3,349 at the time of arrest; crush video distributors derive "a lucrative income from the sales and making of these videos"); *id.* at 62 ("Devotees buy nearly $1 million worth of the tapes every year."); 145 CONG. REC. H10267, H10273 (statement of Rep. Lantos) (stating that videos sell for up to $100 and "over three thousand titles [are] now for sale"); *see also* 145 CONG. REC. H10267, H10267 (statement of Rep. McCollum) ("Entire industries have sprung up appealing to these unusual sexual fetishes.").

[326] Gibson, *supra* note 124.

[327] *Id.*

[328] ASPCA Brief, *supra* note 59, at 10 n.15. A Grand Champion has won five fights, while a Champion has won three.

[329] *See id*. at 9 (citing Haines, *supra* note 311 ("[P]itting champions or grand champions against one another can drive up the stakes in a dogfight to as much as $10,000."); *id*. (asserting that championship status increases stud fees and the cost of puppies); Simpson, *supra* note 303 (noting that wagers at organized fights range from $100 to $50,000); Huoy, *supra* note 304 (purse runs up to $50,000).

[330] Julie Bank & Stephen Zawistowski, *History of Dog Fighting*, ASPCA ANIMAL WATCH (1997), *available at* http://www.aspca.org/fight-animal-cruelty/dog-fighting/history-of-dog-fighting.html ("[T]he owner of a grand champion . . . can sell the dog's pups for at least $1,500 apiece.").

[331] ASPCA Brief, *supra* note 59, at 10.

[332] *Id.* at 8 n.13 (citation omitted).

further noted, "the prosecutors from around this country . . . [appeal to us for this bill] . . . . [T]he producer and distributor of the video, the person making the big bucks, is not violating any current State or Federal laws."[333] The Third Circuit conceded that the drying-up-the-market theory, based on decreasing production, is "potentially apt in the animal cruelty context," but stated that no empirical evidence confirms that theory's validity.[334] According to the HSUS, at least some evidence indicates that Section 48 eliminated the financial incentive driving crush videos (and simultaneously stopped the senseless and illegal acts of animal cruelty depicted therein).[335] According to a member of the Pennsylvania Attorney General's office, taking a popular dog-fighting journal out of publication after its owner's arrest "reduces the profit and without the profit, the incentive to participate in this activity is diminished."[336] A crush filmmaker recently admitted that publicity about crush videos had forced him out of the business of selling the films via adult magazines.[337] Perhaps in anticipation of a crackdown on crush videos following Section 48's enactment, a crush video website began showing women crushing inanimate objects instead of animals.[338] Likewise, Section 48 had heretofore prevented a Florida company from broadcasting Puerto Rican cockfights on the Internet.[339] Unfortunately, the Majority's decision may have undone the progress that Section 48 had achieved; animal cruelty depictions came back online shortly after the Third Circuit's decision.[340] As one commentator observed, the *Ferber* court upheld a ban on child pornography without citing any empirical evidence in support of its drying-up-the-market rationale; "the empirical evidence it did cite actually supported a less restrictive alternative to criminalizing the expression at issue: enforcing obscenity statutes."[341]

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[333] *Id.* at 8 (citing 145 CONG. REC. H10267, H10270 (statement of Rep. Gallegly)).
[334] United States v. Stevens, 533 F.3d 218, 230 (3d Cir. 2008).
[335] ASPCA Brief, *supra* note 59 (citing David S. Jackson, *Congress Stamps Out Animal-Snuff Videos*, TIME, Sept. 6, 1999; HSUS Brief, *supra* note 100, at 8-10 (citing Elton W. Gallegly, *Beyond Cruelty*, U.S. FED. NEWS, Dec. 16, 2007, internal citations omitted)).
[336] Haines, *supra* note 311.
[337] ASPCA Brief, *supra* note 59 at 10 n.18 (citation omitted).
[338] *Id.* (citing David S. Jackson, *Congress Stamps Out Animal-Snuff Videos*, TIME, Sept. 6, 1999).
[339] Reynolds, *supra* note 3, at 386.
[340] ASPCA Brief, *supra* note 59, at 10 (citing CRUSH-FETISH NET CLIP STORE, http://xxxfetish-media.com/shop68/shop.php?&dept=313&type=VIDEO&page =1 (last visited June 3, 2009) (crush videos); CRUSH CUTIES, http://www.crushcuties.com (last visited June 5, 2009) (same).
[341] Strossen, *supra* note 72, at 96.

d.The possibility that Section 48 prohibits socially valuable speech is "exceedingly modest, if not, *de minimus*"[342]

As Justice Alito observed, "depictions of dogfights that fall within §48's reach have by definition no appreciable social value."[343] According to proponents of Section 48, Congress narrowly tailored the statute such that it covered only depictions that lack redeeming social value and portray criminal acts;[344] as such, Section 48 would have been unlikely to reap negative repercussions on the exercise of free speech.[345] Section 48 exempted "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value."[346] Significantly, the statute upheld in *Ferber* contained no such exception.[347] Even the obscenity test articulated in *Miller v. California*[348] only exempts works that, taken as a whole, lack serious "literary, artistic, political, or scientific value."[349]

While the Majority acknowledged that Congress modeled Section 48's exceptions clause on the Court's language in *Miller*, well-intentioned reliance on precedent did not save the law. As Chief Justice Roberts explained, "[i]n *Miller* we held that 'serious' value shields depictions of sex from regulation as obscenity . . . We did not, however, determine that serious value could be used as a general precondition to protecting other types of speech in the first place . . . Thus, the protection of the First Amendment presumptively extends to many forms of speech that do not qualify for the serious-value exception of §48(b), but nonetheless fall within the broad reach of §48(c)."[350] After noting that the Government's interpretation of Section 48's exceptions clause "requires an unrealistically broad reading,"[351] Chief Justice Roberts cautioned that Section 48's requirement of "serious value" "should be

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[342] New York v. Ferber, 458 U.S. 747, 762 (1982).
[343] United States v. Stevens, 130 S. Ct. 1577, 1602 (2010) (Alito, J., dissenting) ("As noted, §48(b) exempts depictions having any appreciable social value, and thus the mere inclusion of a depiction of a live fight in a larger work that aims at communicating an idea or a message with a modicum of social value would not run afoul of the statute."). Some critics of Section 48 agree that crush videos lack any redeeming social value. *See* Adams at 219, *supra* note 2; Reynolds, *supra* note 3, at 386 ("[T]he depictions prohibited by §48 lack any serious value.").
[344] *Ferber*, 458 U.S. at 762.
[345] *Id.*
[346] ASPCA Brief, *supra* note 59 at 26 (citing 18 U.S.C. § 48(b) (2009)).
[347] *Id.* (citing *Ferber*, 458 U.S. at 750–51 (discussing N. Y. PENAL Law § 263.05 and 263.00(1))).
[348] Miller v. California, 413 U.S. 15, 15 (1973).
[349] ASPCA Brief, *supra* note 59.
[350] United States v. Stevens, 130 S. Ct. 1577, 1591 (2010).
[351] *Id*. at 1590.

taken seriously."[352] The Majority also pointed out that since most hunting videos are designed for entertainment, not instruction, they would potentially violate Section 48.[353]

This argument misses the mark because in order for Section 48 to have applied: (i) the depiction must have included a *live* animal, not an animated, virtual, stuffed, or dead one; (ii) the animal must have been subjected to *intentional and illegal acts of animal cruelty*, not legal methods of killing such as fishing, hunting, or lawful euthanasia of a pound animal; *and* (iii) the depiction must have been created, possessed, or sold and *placed in interstate or foreign commerce for commercial gain*, not a home video created only for personal enjoyment.[354] As explained during legislative debate on Section 48, Congress never intended the statute to encompass depictions of hunting.

> These exceptions would ensure that an entertainment program on Spain depicting bull fighting or a news documentary on elephant poachers, to state two examples[,] would not violate the new statute . . . . [because] the bill requires that the conduct depicted be illegal . . . *the sale of depictions of legal activities, such as hunting and fishing, would not be illegal . . . [the law] will in no way prohibit hunting, fishing, or wildlife videos.*[355]

Section 48's record of enforcement speaks for itself. The law had never been used to challenge a hunting channel or program, and neither Stevens nor the Court pointed to any evidence indicating that Section 48 had had a chilling effect on such depictions. Taken together, Section 48's text, legislative history, and record of enforcement contravened the Majority's argument that the law was rightfully invalidated because it could chill depictions of lawful hunting.

Animal violence in films, television, and video games is almost always simulated and conveys a message; thus, it would also have been unaffected by Section 48. Nor would Section 48 apply to *Planet Earth*'s portrayal of a great white shark breaching to capture a seal because the depiction does not show a criminal act of animal cruelty committed by a human against an animal and arguably has redeeming educational, scientific, and perhaps, artistic value.

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[352] *Id.*
[353] *Id.*
[354] Gov't Brief *supra* note 14, at 15.
[355] *But see* 145 CONG. REC. H10267 (statement of Rep. McCollum); *but see* Adams, *supra* note 2, at 207 (Rep. Ron Paul of Texas stated that while the law was not intended to punish hunting or fishing depictions, "legislation often 'gets carried away and is misinterpreted.'").

To the extent a portrayal of animal cruelty is necessary to a film's creation, there is no reason a live animal must be tortured. Animation or computer graphics could simulate the violence.[356] In training videos, dogs could be muzzled, demonstrating attack styles/techniques without injuring themselves or opponents. Bait could also be simulated, fake (*e.g.*, a stuffed animal), or dead. This would simultaneously decrease the incidence of abducting pets to be used as bait to train fighting dogs.[357]

As one Congressman explained during legislative debate surrounding Section 48's enactment:

> I do not believe in my entire time in Congress I have ever seen anything . . . as repulsive as the videotape [crush video] . . . it was even more gruesome as the tape wore on . . . And I can assure anyone who is listening to my comments today that there is nothing redeeming, socially or otherwise, about any of the depictions I witnessed in our hearing the other day.[358]

Another Congressman stated, "[T]here is no redeeming value whatsoever. It does not rise to that level at all to be protected as free speech when we are talking about torturing an animal under the purposes here with all the exemptions we have for journalistic and religious and other reasons."[359] Former President Clinton characterized the conduct portrayed in crush videos as "deplorable and indefensible."[360]

Perhaps the strongest criticism lodged against Section 48 is that it was not intended to encompass dog-fighting videos. Crush videos spurred Section 48's enactment, but Congress wisely drafted the statutory language broadly enough to embrace not only existing crush videos but also new and different animal cruelty depictions. Broader language is sometimes necessary to provide a law with sufficient flexibility to "evolve" with the times. An extremely narrow "crush video" statute that applies only to films of live animals being stomped to death could not be used to prosecute persons who create dog-burning

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[356] ASPCA Brief, *supra* note 59 (citing Ashcroft v. Free Speech Coalition, 535 U.S. 234, 239–240 (2002)).

[357] *Id.* at 25 n.42 (citing Mary Ann Mott, *U.S. Dog-Fighting Rings Stealing Pets for Bait*, NAT'L GEOGRAPHIC NEWS (2004), *available at* http://news.nationalgeographic.com/news/2004/02/0218_040218_dogfighting.html (family pets are often kidnapped and killed as bait to train fighting dogs)).

[358] *Id.* at 28 (citing 145 CONG. REC. H10267 (statement of Rep. McCollum)).

[359] 145 CONG. REC. H10267, H10272 (statement of Rep. McCollum).

[360] President's Statement on Signing Legislation to Establish Federal Criminal Penalties for Commerce in Depiction of Animal Cruelty, 34 WEEKLY COMP. PRES. DOC. 2557 (Dec. 9, 1999) (Section 48 will "assist in reducing or eliminating . . . deplorable and indefensible practices.").

videos -- a new genre in which live dogs are burned on tape to satisfy viewers' depraved sexual interests. Congress would be required to draft and enact an entirely new "dog-burning depiction" law, which would be costly, inefficient, and wasteful. Had Congress only intended Section 48 to apply to crush videos, it could have included language specific to "crushing"; the fact that it did not indicates that Congress intended Section 48 to cover a broader range of depictions of animal cruelty.

The Government argued that prosecutorial discretion would have provided additional safeguards against applications of Section 48 beyond the narrow scope for which it was intended. In rejecting this argument, the Majority countered that it "would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."[361] The Majority even described an Executive Branch announcement clarifying that Section 48 would only apply to "depictions of 'wanton cruelty to animals'" as "an implicit acknowledgement of the potential constitutional problems with a more natural reading [of the statute]."[362]

e. Banning depictions of animal cruelty comports with First Amendment jurisprudence

Turning to the final *Ferber* factor, it is well settled that certain categories of speech are categorically excluded from First Amendment protection, including fighting words,[363] threats,[364] incitement,[365] child pornography,[366] obscenity,[367] "[o]ffers to provide or requests to obtain child pornography,"[368] "[o]ffers to engage in illegal transactions,"[369] and "[o]ffers to provide or requests to obtain unlawful material, whether as part of a commercial exchange or not."[370] Like the aforementioned categories of unprotected speech, the depictions of animal cruelty that Section 48 was intended to target are devoid of the exposition of ideas, endanger mankind by desensitizing viewers to violence, erode public mores, incite and condone savage acts of violent crime toward defenseless victims, necessitate offers to engage in the crime of animal

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[361] United States v. Stevens, 130 S. Ct. 1577, 1591 (2010).
[362] *Id.*
[363] ASPCA Brief, *supra* note 59, at 23.
[364] *Id.* (citing Watts v. United States, 394 U.S. 705, 707 (1969)).
[365] *Id.* (citing Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969)).
[366] *Id.* (citing New York v. Ferber, 458 U.S. 747, 764 (1982)).
[367] *Id.* (citing Roth v. United States, 354 U.S. 476, 483 (1957)).
[368] *Id.* (citing United States v. Williams, 553 U.S. 285, 299 (2008)).
[369] *Id.*
[370] *Id.* at 1842.

cruelty, and/or appeal to the prurient interest of depraved individuals aroused by animal brutality.[371]

Furthermore, speech that forms an integral part of a criminal violation is unprotected.[372] Creating a dog-fighting video requires the filmmaker to solicit, attend, or promote the fight, which is often illegal.[373] Crush videos are predicated on crimes of animal cruelty and require filmmakers to solicit and conspire with others, such as the actress or customer, to plan and record the crime.[374] As the *Ferber* Court announced, "[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute."[375] Because the depictions of animal cruelty targeted by Section 48 form an integral part of the violation of animal cruelty statutes or the related crimes described above, they do not warrant First Amendment protection.[376]

f. In determining whether Section 48 satisfies the *Ferber* factors, the proper comparison is between depictions of child pornography and depictions of animal cruelty, not between children and animals

The Third Circuit erroneously concluded that an analogy to *Ferber* fails primarily because children and animals differ.[377] Yet the proper

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[371] The Third Circuit conceded that the aforementioned categories could be supplemented, which was appropriate in this case because the depictions that Section 48 prohibited lack redeeming social value, instigate violent crime, and erode public mores. *See* United States v. Stevens, 533 F.3d 218, 224 (3d Cir. 2008).

[372] ASPCA Brief, *supra* note 59, at 24 (citing New York v. Ferber, 458 U.S. 747, 761–62 (1982) (citing Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949))); *see Stevens*, 130 S. Ct. at 1598–99 (2010) (Alito, J., dissenting) ("The *First Amendment* protects freedom of speech, but it most certainly does not protect violent criminal conduct, even if engaged in for expressive purposes. Crush videos present a highly unusual free speech issue because they are so closely linked with violent criminal conduct. The videos record the commission of violent criminal acts, and it appears that these crimes are committed for the sole purpose of creating the videos.").

[373] ASPCA Brief, *supra* note 59, at 5 n.10 (citing Huoy, *supra* note 304 (noting that in Pennsylvania it is a criminal offense to aid in or promote illegal dog fighting); *see also* 720 ILL. COMP. STAT. 5/26-5 (2011) (making it illegal to knowingly attend a dogfight); TEX. PENAL CODE ANN. § 42.10 (2011) (same)).

[374] ASPCA Brief, *supra* note 59, at 24 n.40 ("[C]reating a crush video requires the filmmaker to solicit and conspire with another to commit a crime of animal cruelty and aid or abet that crime.") (citing Gibson, *supra* note 124).

[375] *Id.* (quoting *Ferber*, 458 U.S. at 761–62).

[376] *Id.* (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); *Ferber*, 458 U.S. at 761–62).

[377] *Id.* at 34 (citing United States v. Stevens, 533 F.3d 218, 232 (3d Cir. 2008));

comparison is between depictions of child pornography and depictions of animal cruelty, not between children and animals. *Ferber* stands for the notion that a category of speech does not merit constitutional protection,

> . . . where it depicts -- and thus necessarily requires -- the intentional infliction of physical harm on a class of especially vulnerable victims in violation of law, where the distribution of such depictions spurs their production but laws prohibiting the underlying acts are woefully under-enforced, and where the speech's social value is so *de minimus* as to be outweighed by the important governmental goal of protecting the victims.[378]

Another similarity between depictions of child pornography and depictions of animal cruelty is that the production of each of them necessitates harm. *Ferber* prohibits child pornography even where minors have consented to and/or receive compensation for their participation.[379] Animal victims cannot consent to mutilation and torture.[380]

ISAR summarized the seeming absurdity of the Third Circuit's argument as follows:

> [G]iven the seemingly endless varieties of depravity, one could easily imagine underground groups of people who gather and pay to watch live 'performances' of human adults being tortured to death, and narrated videotapes of those events being made and sold.

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see Reynolds, *supra* note 3, at 385–86 ("[T]he Third Circuit correctly notes that the depiction of the animal cruelty does not cause any psychological harm on the animal in the same way that a depiction of sexual abuse might cause harm to a child. . . . Whether or not the child is truly affected by the existence of a depiction of abuse, the primary rationale behind Ferber is the desire to prevent the underlying abuse in the first place. The constitutionality of §48 should not turn on this factor."); Robbins, *supra* note 219, at 131–32 (Some may argue that to many American pet owners, pets are like children. In fact, a recent study found that 99% of dog and cat owners thought of their pets as family members, not mere property.).

[378] *Stevens*, 533 F.3d at 243.

[379] *See* Reynolds, *supra* note 3, at 380 ("[T]he age of consent in some states is as low as sixteen, and some states allow minors to engage in consensual sex with other minors. These acts are not illegal, but to film them and distribute the film across state lines would be. Furthermore, the age of consent in some foreign countries can be as low as thirteen. Despite the fact that a sexual act with a thirteen-year-old may be legal in that country, possessing any depiction of the act in the United States would subject the possessor to criminal liability.").

[380] *Id.* at 381.

> Because the societal value of the 'expression' on those tapes would be zero, no one seriously would doubt the government's power to criminalize the interstate trafficking in such depictions, even though: (a) they would involve adults, not children; (b) the circulation of the videotapes would not cause lingering harm to the dead victims; (c) both the live acts and the later trafficking in depictions of those acts would be money-making activities, so that suppression of the images arguably would not 'dry up the market' for the live performances; and (d) the mere watching of actual murders-by-torture would not necessarily lead viewers to commit that crime. By the Court of Appeals' reasoning, however, a statute criminalizing such depictions would have to be struck down for failure to meet the *Ferber* factors. Indeed, by the Court of Appeals' reasoning, it might well also have reversed Respondent's conviction had the statute reached the sale of depictions of adults engaged in sexual intercourse with animals.[381]

ACT FOUR: THE FINAL CUT

A. THE IMPACT OF U.S. V. STEVENS

In the wake of *Stevens*, the Court is unlikely to categorically exclude depictions of animal cruelty, even crush videos, from First Amendment protection primarily because such speech has not historically been prohibited.[382] As such, *Stevens* may provoke a domino effect of negative consequences: (i) enabling the brutal and unchecked slaughter of countless animals via unlawful animal fighting; (ii) facilitating the commission of animal cruelty; (iii) clogging already back-logged courts and law enforcement agencies with animal cruelty-related prosecutions; (iv) increasing the likelihood of children's exposure to gruesome depictions of animal cruelty and animal fighting; (v) enhancing the risk of pet-nappings to procure bait or victims for use in dog-fighting and crush videos, respectively; (vi) desensitizing Americans to violence against humans and animals; and (vii) facilitating the continued erosion of already imperiled public mores.

Stevens may also have the indirect effect of endangering existing animal cruelty legislation nationwide or preventing enactment of new laws even where the laws differ from Section 48 in purpose or effect, because as with *Lukumi,* courts may misinterpret *Stevens* to indicate that

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[381] ISAR Brief, *supra* note 17, at 26 n.23.
[382] *See* Strossen, *supra* note 72, at 101.

preventing animal cruelty does not constitute a compelling government interest.

Moreover, the Majority's declaration that use of the words "wounded" or "killed" made Section 48 constitutionally overbroad could also imperil animal welfare legislation nationwide by prompting challenges to state anti-cruelty laws with similar language. For example, New York prohibits the unjustifiable "killing" of an animal, with certain exceptions.[383] It remains unclear whether *Stevens* will make laws like New York's susceptible to challenges or whether state legislatures will preempt such challenges by amending their laws to comport with the decision. Such amendments may narrow the laws' coverage, perhaps reducing their effectiveness.

B. Legislative Responses to U.S. v. Stevens[384]

While *Stevens* will have significant consequences on the battle to end animal cruelty, it neither signals the end of animal welfare legislation nor stands for the notion that preventing animal cruelty is not a compelling interest. In fact, the decision cannot be read to preclude the enactment of new laws prohibiting depictions of animal cruelty, so long as those laws address the Majority's concerns. As Chief Justice Roberts remarked, "[w]e therefore need not and do not decide whether a statute *limited to crush videos or other depictions of extreme animal cruelty* would be constitutional."[385]

1. Initial Reactions

Congress took this not-so-subtle hint, and in April of 2010, Representative Elton Gallegly introduced H.R. 5092 -- a bill that prohibited persons from "knowingly sell[ing] or offer[ing] to sell an animal crush video in interstate or foreign commerce for commercial gain."[386] A more comprehensive bill -- H.R. 5566 -- soon followed. In June of 2010, the House Judiciary Committee approved H.R. 5566, 23-0, which in its original version, prohibited a person from "knowingly and for the purpose of commercial advantage or private financial gain sell[ing] or offer[ing] to sell, or distribute[ing] or offer[ing] to distribute, an animal crush video in interstate or foreign commerce."[387] Findings accompanying H.R. 5566 stated:

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[383] Rosa, *supra* note 181, at 287–88 (discussing N.Y. Agric. & Mkts. Law 353 (citation omitted)).

[384] This Article only addresses H.R. 5092, a version of H.R. 5566, and the Crush Act.

[385] United States v. Stevens, 130 S. Ct. 1577, 1592 (2010) (emphasis added).

[386] H.R. 5092, 111th Cong. (2d Sess. 2010).

[387] H.R. 5566, 111th Cong., (2d Sess. 2010) p. 3 ("H.R. 5566").

> (i) preventing animal cruelty is a compelling government interest;
>
> (ii) every state and the District of Columbia criminalize intentional acts of extreme animal cruelty;
>
> (iii) [t]he clandestine nature of certain acts of animal cruelty allows the perpetrators of such crimes to remain anonymous, thus frustrating the ability of Federal and State authorities to enforce the criminal statutes prohibiting such behavior;
>
> (iv) these criminal acts constitute an integral part of the production of and market for so-called crush videos and other depictions of animal cruelty;
>
> (v) the creation and sale of crush videos provide an economic incentive for, and are intrinsically related to, the underlying acts of the criminal conduct;
>
> (vi) the United States has a long history of prohibiting the interstate sale of obscene and illegal materials; and
>
> (vii) animal crush videos appeal to the prurient interest and are obscene.[388]

H.R. 5566 defined "animal crush video" as:

> any obscene photograph, motion-picture film, video recording, or electronic image that depicts actual conduct in which one or more living animals is intentionally crushed, burned, downed, suffocated, or impaled in a manner that would violate a criminal prohibition on cruelty to animals under Federal law or the law of the State in which the depiction is created, sold, distributed, or offered for sale or distribution.

To assuage concerns of overbreadth, H.R. 5566 excluded visual depictions of "customary and normal veterinary or agricultural husbandry practices; the slaughter of animals for food; or hunting, trapping, or fishing."[389]

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[388] *Id.*
[389] *Id.*

On July 21, 2010, the House passed H.R. 5566, and in September of 2010, an amended version of the bill received Senate approval.[390] On December 9, 2010, President Obama signed the Crush Act into law.[391]

a. The Crush Act: Section 48, New but Improved?

The Crush Act is a welcome legislative solution that nonetheless leaves much to be desired. In its evolution from bill to Public Law 111-294, H.R. 5566 underwent significant changes. The findings have been expanded to reflect the views and opinions of the federal government and various amici that endorsed upholding Section 48. The findings now emphasize, *inter alia*, the "long history of prohibiting the interstate, sale, marketing, advertising, exchange, and distribution of obscene material and speech that is integral to criminal conduct" and state that "[t]here are certain extreme acts of animal cruelty that appeal to a specific sexual fetish. These acts of extreme animal cruelty are videotaped, and the resulting video tapes are commonly referred to as 'animal crush videos.'"[392] The latter finding narrows the Crush Act's scope and application because it could be read to exclude from coverage videotapes not made to satiate a sexual fetish, perhaps providing the accused with an affirmative defense, *i.e.*, that the film was not made to appeal to the prurient interest in sex. The findings also make clear that in the judgment of Congress, at least some crush videos constitute obscenity, and the Crush Act only applies to obscene speech. As such, under a literal reading of the statute, a snuff film of a living puppy being gagged, burned alive, and decapitated would not be covered so long as it was made for entertainment, not to appeal to the prurient interest in sex. Depictions of unlawful animal fighting are also excluded. These statutory changes may address the concerns raised by the Majority in *Stevens*, but they also reduce the law's scope and effectiveness. Furthermore, the mere fact that a film is not intended to arouse a depraved viewer does not change the harmful effects flowing from the depiction or prevent the underlying act of animal cruelty its creation necessitates.

The findings also raise questions regarding whether preventing animal cruelty, as opposed to extreme animal cruelty, constitutes a compelling government interest. The Crush Act asserts that "[t]he Federal Government and States have a compelling interest in preventing intentional acts of extreme animal cruelty."[393] This could be read to imply that, in Congress's view, preventing animal cruelty, not extreme

[390] H.R. 5566 Bill Tracking, 111th Cong. (2d Sess. 2010).
[391] *Id.*
[392] P.L. 111-294, H.R. 5566.
[393] *Id.*

animal cruelty as defined by the Crush Act, does not constitute a compelling government interest.

The Crush Act significantly differs from its predecessor legislation. Figure One summarizes several of these key differences, some of which are discussed below.

Figure One: Comparing the Original and Amended Versions of Section 48

Provision	Section 48	The Crush Act
Mens Rea	Knowingly create, sell, or possess; Intentionally maim, mutilate, etc.	Knowingly create, sell, market, etc.; Intentionally crush, burn, etc.
Prohibited Conduct	Creates, sells, or possesses	Creation where one intends or has reason to know that the video will be distributed in, or using a means or facility of, interstate or foreign commerce or the video is distributed in, or using a means or facility of, interstate or foreign commerce; Sell, market, advertise, exchange, or distribute
Interstate Commerce	With the intention of placing that depiction in interstate or foreign commerce for commercial gain	Creation where one intends or has reason to know that the video will be distributed in, or using a means or facility of, interstate or foreign commerce or the video is distributed in, or using a means or

		facility of, interstate or foreign commerce; Sell, market, advertise, exchange, or distribute in, or using a means or facility of, interstate or foreign commerce
Penalty	Fine plus a maximum of 5 years imprisonment or both	Fine plus a maximum of 7 years in prison or both
Exceptions	Exempts works of serious religious, political, scientific, educational, journalistic, historical, or artistic value	Exempts works, which taken as a whole, have literary, artistic, political, or scientific value, and are, thus, not obscene
Depictions	Visual or auditory, including photograph, motion-picture film, video recording, electronic image, or sound recording	Any photograph, motion-picture film, video or digital recording, or electronic image
Living Animal	Living animal	Living non-human mammal, bird, reptile, or amphibian
Prohibited Cruelty	Maimed, mutilated, tortured, wounded, killed	Crushed, burned, drowned, suffocated or otherwise subjected to serious bodily injury (as defined in section 1365)
Obscenity	N/A	Depiction must be obscene
Conduct Criminal under	If such conduct is illegal under	N/A

Conduct Criminal under State or Federal Law	If such conduct is illegal under federal law or the law of the state in which the creation, sale, or possession takes place, regardless of whether the maiming mutilation, torture, wounding, or killing took place in the state	N/A
Preemption	No provision	Law does not preempt state or local law
Extraterritorial Application	No provision	Applies extraterritorially
Good Faith Distribution Exception	No provision	Permits good faith distribution to law enforcement or a third party for the sole purpose of analysis to determine if a referral to a law enforcement agency is appropriate
Veterinary Exception	No provision	Depiction of customary and normal veterinary practices
Animal Husbandry Exception	No provision	Depiction of customary and normal agricultural husbandry practices
Animal Slaughter Exception	No provision	Depiction of the slaughter of animals for food
Hunting Exception	No provision	Depiction of hunting, trapping, or fishing

As Figure One illustrates, the Crush Act differs from Section 48 in many ways. First and perhaps most significantly, the Crush Act defines "animal crush video" as:

> [a]ny photograph, motion-picture film, video or digital recording, or electronic image that -- (1) depicts actual conduct in which 1 or more living non-human mammals, birds, reptiles, or amphibians, is intentionally crushed, burned, drowned, suffocated or otherwise subjected to serious bodily injury (as defined in section 1365 and including conduct that, if committed against a person and in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242); and (2) is obscene.[394]

While Section 48 applies to "living animals," including fish, crustaceans, insects, worms, etc., the Crush Act is limited to "living non-human mammals, birds, reptiles or amphibians."[395] The Crush Act further limits the scope of animal protection because it only applies to visual depictions whereas Section 48 also applies to auditory recordings.

Section 48 embraced depictions of maiming, mutilation, torture, wounding, and killing that would constitute criminal animal cruelty under federal, state, or local law. The Crush Act, however, applies to crushing, burning, suffocation, drowning, impaling, or otherwise subjecting to serious bodily injury as defined in Section 1365. Removal of the words "wounding" and "killing" directly addresses the overbreadth concerns raised by the Majority in *Stevens*, but inclusion of the term "serious bodily injury" may not encompass all of the harms that the law should ideally address, including interspecies sexual assault and/or bestiality.

Section 48 applied to depictions of animal cruelty generally, but the Crush Act's application is limited to obscene depictions, *i.e.*, those that appeal to the prurient interest in sex, are patently offensive, and lack serious literary, artistic, political, or scientific value. As such, the law could be read to exclude (and thus permit) the sale of a depiction of a living dog being intentionally burned so long as the depiction was not created to satiate a sexual fetish. Evidence suggests that crush videos are created to appeal to specific sexual fetishes, but the legislative history of Section 48 nowhere mentions sexual fetishes linked to burning, drowning, or other acts of extreme animal cruelty. Although the absence of such evidence does not preclude the possibility of its existence, this definition does heighten the burden of proof to secure a conviction since,

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[394] *Id.*
[395] *Id.*

in addition to proving each element of prong one, *i.e.*, the victim was alive, the perpetrator acted intentionally, and the animal was subjected to "serious bodily injury" as defined by Section 1365, the prosecutor must also prove that the depiction is obscene.

In narrowing Section 48, Congress also removed its broad exceptions clause, which excluded works having serious religious, political, scientific, educational, journalistic, historical, or artistic value. By comparison, the Crush Act exempts non-obscene works having literary, artistic, political, or scientific value and adds exceptions for good faith distribution to law enforcement as well as visual depictions of customary and normal veterinary practices, agricultural husbandry practices, animal slaughter for food, and hunting, fishing, and trapping.[396] At first glance, these exceptions appear to address the concerns of the Majority, but a more thorough analysis suggests that the Crush Act remains susceptible to overbreadth challenges because it no longer exempts works having educational, religious, journalistic, or historical value. It also fails to exempt, *inter alia*, visual depictions used for animal research and forms of lawful gaming *other* than hunting, trapping, and fishing. In sum, congressional attempts to narrow the law gave it less bite but did not necessarily guarantee that it will survive future overbreadth challenges.

The Crush Act is a laudable response to *Stevens* but remains, at best, an imperfect legislative solution that may or may not pass muster.[397] The following section recommends measures aimed to give the Crush Act back its bite, reduce its susceptibility to legal challenges, and improve its overall effectiveness. Because a complete discussion of the legal and extralegal implications of these recommendations exceeds the scope of this Article, the author suggests each of them only to the extent permissible by applicable law and regulation.

i. ***Rename the Bill***: Although the Crush Act covers depictions of animal cruelty involving impaling, suffocating, burning, drowning, crushing and causing serious bodily harm to animals as defined by statute, it is misleadingly titled "Animal *Crush* Video Prohibition Act of 2010." Members of the public and snuff filmmakers, *inter alia*, may misinterpret this title to mean that the law only covers crush videos, lessening its prevention of crime. To avoid confusion, Congress should rename the bill "Depictions of Extreme Animal Cruelty Prohibition Act of 2010." This adopts the language of the *Stevens* Majority, which stated, "[w]e therefore need not and do not decide whether a statute limited to crush

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[396] *Id.*

[397] A full discussion of each suggested revision or its susceptibility to constitutional or other challenges exceeds the scope of this Article.

videos or other depictions of extreme animal cruelty would be constitutional."[398]

ii. ***Include a Statement of Purpose and Intent****:* Congress should amend the Crush Act to include a Statement of Purpose and Intent. Clarifying the law's intended scope and purpose may make it less susceptible to constitutional challenges.

iii. ***Expand the Findings***: Congress should expand the findings to include journalistic reports, scientific evidence, case law, and other data that, *inter alia*, support the connection between animal cruelty and attendant evils, including other crime, desensitization, and domestic violence.

iv. ***Redefine "Animal"****:* Legislators should amend the Crush Act to define "animal" as "any living non-human vertebrate regardless of ownership."[399] This broad definition will prevent violators from circumventing prosecution by victimizing wildlife, stray dogs, or other animals that the law may not embrace. It may also make the bill less susceptible to overbreadth and vagueness challenges by clarifying its scope.[400]

v. ***Rename and Redefine "Animal Crush Video"****:* To avoid confusion over which depictions the Crush Act embraces, Congress should amend the law to replace "animal crush video" with "depiction of extreme animal cruelty." Congress should define a "depiction of extreme animal cruelty" as follows:

> intentionally and cruelly crushing, burning, impaling, suffocating, drowning, beating, sexually assaulting or otherwise committing acts of bestiality with,[401] raping, sodomizing, skinning, stabbing, stoning, cutting, electrocuting, mutilating, dismembering, disfiguring,

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[398] United States v. Stevens, 130 S. Ct. 1577, 1592.

[399] *See* Madeline, *supra* note 183, at 332–33 (noting that HSUS recommends using Michigan's anti-cruelty statute as a model, and that statute defines "animal" as "any vertebrate other than a human being.").

[400] *See id*. at 319.

[401] Bestiality was originally encapsulated in "crimes against nature" laws, but the recent repeal of many such laws has inadvertently decriminalized interspecies sexual assault, unless the conduct falls under an animal cruelty or other statute. Not only should state legislatures amend state anti-cruelty laws to include bestiality, but also states should recognize that to the extent Section 48 covered depictions of bestiality, such depictions clearly fall under the obscenity doctrine since they are sexual images, which taken as a whole, would offend community norms and appeal to the prurient interest in sex. *See* LOCKWOOD, *supra* note 3, at 23.

torturing, choking, strangling, hanging, poisoning, beheading, throwing off a building, canned hunts[402] or other unlawful animal fighting, using as bait in illegal animal fighting or canned hunts, gagging, tearing apart, decapitating, drugging, or committing other forms of extreme cruelty and/or serious bodily harm as defined in Section 1365 without regard to whether commission of the cruelty results in permanent bodily injury, dismemberment, disfiguration, and/or death to the animal victim(s).

This definition will better ensure that perpetrators will not escape prosecution merely because the animal victim does not die or sustain a permanent injury. Use of the phrase "intentionally and cruelly" addresses the Majority's assertion that Section 48 was overbroad in part because it did not require that the conduct depicted be "cruel."

vi. ***Expand and Clarify the Exceptions Clause***: To address the Majority's concerns regarding Section 48's overbreadth, the Crush Act should except works, which, taken as a whole, have serious literary, historical, journalistic, educational, political, historical, religious, artistic, and/or scientific value. Congress should consider including a statutory definition of the term "serious value" and consider designating a governmental body to promulgate regulations defining each exception and/or providing specific examples of depictions that fall within the embrace of each term used in the exceptions clause.

vii. ***Add Exemptions***: To make the Crush Act less susceptible to judicial challenges and avoid a *Lukumi* challenge, Congress should amend the law to add the following exemptions:

a. Depictions of the lawful use of animals in depictions of bona fide and lawful religious practices;

b. Depictions of lawful and humane veterinary procedures or euthanasia conducted for lawful research, scientific, treatment, or other veterinary purposes;

c. Depictions of lawful and humane medical procedures or euthanasia conducted for lawful research, scientific,

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[402] A canned hunt is "the practice of paying a fee to kill, either by gun, bow and arrow, or spear, an animal that has been tied down, hobbled, staked, caged, boxed, or penned inside a fenced area." Rosa, *supra* note 181, at 294 n.44.

treatment, or other medical purposes, such as xenotransplantation research;

d. Depictions of lawful, humane, and customary hunting, fishing, trapping, or other gaming activities;

e. Depictions of lawful and humane animal research, testing, and experimentation at approved labs and facilities;

f. Depictions of lawful, humane, and customary animal control procedures or activities;

g. Depictions of lawful, humane, and customary animal husbandry and slaughter of livestock for agricultural purposes;

h. Depictions of lawful, humane, and customary animal sporting events, including but not limited to rodeos, horse and dog races, and equestrian sports;

i. Depictions of lawful, humane, and customary methods of pest control; and

j. Depictions of justifiable self-defense or defense of another human or animal in response to an unprovoked and/or unintended animal attack.[403]

viii. ***Expand the Good Faith Distribution Exception***: This exception should be expanded to include distribution to animal cruelty task forces, prosecutors, attorney generals, and animal rights organizations for the purpose of educating others on what constitutes a violation of the Crush Act and/or to prevent, investigate, and prosecute violations of the Crush Act or general anti-cruelty or animal fighting statutes.

The following recommendations likely cannot be accomplished via statutory amendment, standing alone.

ix. ***Clarify the Penalty***: To address the Majority's concerns regarding overbreadth, the penalty section should clarify the way the fine shall be determined and/or provide a minimum and maximum fine for a single violation. The penalty section should allow for the fine to double or triple for subsequent violations of the law.

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[403] *See* Madeline, *supra* note 183, at 332–33 (citing Mich. Comp. Laws § 750.50b (1999)).

x. ***Increase Penalties***: To increase the law's effectiveness by guaranteeing that punishment for its violation exceeds the financial gain resulting therefrom, Congress should take action to enable courts to impose penalties modeled after those in existing state anti-cruelty laws, such as limitations on future employment related to animal care or control (*e.g.*, zookeeper, veterinary technician, etc.).[404] Heightened penalties should be imposed for aggravating circumstances, including but not limited to a depiction involving a kidnapped pet or service animal, multiple animal victims, pregnant or disabled animal victims, cruelty involving sexual assault or genital mutilation, multiple perpetrators, postmortem dismemberment, prior convictions for the same offense, the use of children in creating the video, and using law enforcement, pet or service animals.[405]

xi. ***Add Animal Seizure Provisions***: Most state anti-cruelty laws provide for animal seizure as appropriate.[406] Congress should consider amending the Crush Act to add animal seizure provisions that will enable enforcement authorities to remove animal victims (or intended animal victims) from abusive environments so that

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[404] *See* LOCKWOOD, *supra* note 3, at 40 ("Some states restrict those convicted of animal cruelty from employment in professions involving direct contact with or responsibility for animals, including positions in animal care and control. . . . Most states have provisions in the cruelty laws for restitution to agencies or individuals providing housing, care and veterinary services.").

[405] *See id*. at 34–35 (discussing factors considered in assessing the dangerousness of perpetrators of animal cruelty, including: (i) "victim vulnerability;" (ii) number of victims; (iii) severity of injury; (iv) use of fire; (v) repetition of injuries; (vi) multiple forms of injury; (vii) binding or incapacitation; (viii) length of abuse; (ix) "act was committed with high risk of detection or observation"; (x) "other illegal acts were committed at the scene of the animal cruelty;" (xi) person instigated act involving multiple perpetrators; (xii) use of animal cruelty to threaten, coerce, or intimidate; (xiii) postmortem dismemberment; and (xiv) sexual assault or genital mutilation).

[406] *Id*. at 39 ("Most state anti-cruelty laws contain specific provisions that allow for the removal of animals from an owner convicted of animal cruelty. This is usually the primary concern of agencies investigating and responding to complaints of animal abuse and neglect. This removal may be limited to the animals specifically enumerated in the charges, or may be extended to include all animals possessed by the offender. Usually the animals will be surrendered to the investigating agency for appropriate disposition -- either adoption, sale or humane euthanasia. Often the courts impose a lien on such animals that allows any funds generated to be used to compensate agencies for the expense of housing and care, although such agencies rarely receive compensation equaling their costs of caring for the animals. Simply removing only those animals that have been proven to be the subjects of cruelty is usually not a satisfactory outcome for the agencies involved in responding to the situation, or to the general public. Whenever possible, protection should be extended to the greatest number of animals that may be at risk of harm.").

they can receive proper care.[407] In addition to other fines, violators of the law should be required to pay the cost of housing, feeding, treating, and rehabilitating animals rescued from abusive situations.

xii. ***Mandate Psychological Assessments***: With regard to sentencing recommendations, courts should mandate psychological assessments and counseling for persons convicted under the law in light of the strong link between psychological disturbance, animal cruelty, and other forms of violence.[408]

C. State Measures[409]

The Crush Act is a positive step but, standing alone, it will not end production of depictions of animal cruelty or more importantly, the animal cruelty itself. Instead, a collaborative approach involving state legislatures, law enforcement officials, prosecutors, healthcare professionals, veterinarians, social workers, animal control officers, animal shelters, domestic violence shelters, and members of the public is necessary to stamp out these evil practices.

To increase uniformity in animal cruelty laws and strengthen their scope and impact, states should consider amending anti-cruelty laws to define "animal" as "any non-human vertebrate regardless of ownership." Since federal law will only prohibit depictions sold or distributed in interstate or foreign commerce, states should fill the gap by implementing new laws or expanding existing ones to cover actual or attempted intrastate sale or distribution of such depictions.[410] States should assign felony status to acts of animal cruelty and increase the penalties arising therefrom, especially where aggravated circumstances exist.[411] Legislatures should also take action to enable enforcement authorities to remove animal victims from dangerous environments.

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[407] *See id*. at 25–26 (discussing various ways in which laws and law enforcement can guarantee removal, care, treatment, and proper placement of abused animals or animals intended to be victims of animal cruelty).

[408] *See id*. at 42 ("[A]bout half of the states address provisions for psychological evaluation and counseling in their animal cruelty laws. Usually this is to be undertaken at the offender's expense. Even when not specifically mandated, such evaluation is usually an appropriate consideration.").

[409] A complete discussion of the legal and extralegal implications of the recommended state measures exceeds the scope of this article. Each measure is recommended to the extent permissible by applicable law and regulations.

[410] *See* Ricaurte, *supra* note 5, at 195–206 (arguing that states can and should apply Son of Sam laws (amended as necessary) to target depictions of animal cruelty).

[411] *See* Forell, *supra* note 233, at 63–64.

To address the connection between animal cruelty and domestic violence, relevant laws should be amended to address coercive animal abuse and to permit such animal abuse, standing alone, to constitute grounds for obtaining a protective order.[412] Battered women's shelters should investigate and report allegations of animal cruelty and should work with animal shelters "to develop safe haven programs that provide temporary emergency housing for the pets of domestic violence victims."[413] Whenever possible, animal shelters, battered women's groups, law enforcement, and attorneys should advise the owners of abused animals of their right to take civil action against abusers, including actions for conversion, loss of companionship or consortium, or intentional infliction of emotional distress.[414] While such civil claims may not prevail, fear of civil litigation may prevent abusers from engaging in additional acts of abuse.

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[412] *See id*. at 64; Ricaurte, *supra* note 5, at 181 ("People who abuse animals may also do so with the intent of causing emotional harm to humans. This is often the case in domestic-violence settings where abusers use pets as a tool to control the women and children in the household.") (internal citations omitted); Friedman & Norman, *supra* note 223, at 88, 95–96 (The Violence Against Women Act ("VAWA") "establishes a federal criminal offense for the violation of a protection order when the restrained party crosses interstate boundaries." While VAWA's "expanded federal protections for victims of domestic abuse do not directly address animal rights, they have still increased the potential for significant reduction of animal abuse cases in the United States through the funding of domestic violence programs and the enforcement of protective orders that also provide protection to animals." "The American Humane Society contends, 'the inclusion of companion animals in domestic violence protective orders is the next logical step . . . .' In response to widespread public support, many state legislatures are considering the addition of protective orders for pets and service animals.").

[413] TRAINING KEY, *supra* note 85, at 3; Friedman & Norman, *supra* note 223, at 87–88 ("Unfortunately, many women's shelters do not investigate whether the violence included pet or service animal abuse. Given that the welfare of pets or service animals has a substantial influence on whether victims choose to flee homes where domestic violence is prevalent, it is critical that service providers capture data and provide refuge to the pets or service animals of victims. Professor Joan Schaffner, a Fellow at the Oxford Center for Animal Ethics, argues that it is imperative for shelters to take the needs of a victim's pet into account and have procedures in place to provide shelter for these animals until reunited with their victim owners. To address this influential factor on the rehabilitation and safety of victims, many Maryland service providers have established -- or plan to establish -- 'safe haven programs,' where pets or service animals can also receive shelter. The American Humane Society, in a manual created for its Pets and Women's Shelters Program, also furnishes guidance to service providers on the issue of allowing pets to stay in shelters with their owners.").

[414] *See* Forell, *supra* note 233, at 65.

States should also consider enacting legislation to require veterinarians to report suspected animal abuse and participation in unlawful animal fighting to the appropriate authorities; by statute, states should clarify that veterinarians are not required to warn pet owners of their reporting obligations prior to providing treatment and are granted immunity from criminal or civil suits for good faith reporting.[415]

Research indicates that injuries sustained from pets are far likelier in abusive homes (69%) than non-abusive homes (6%)[416] because injuries result when pets attempt to protect children or other family members from assault or when pets retaliate against their own abuse.[417] Accordingly, states should consider enacting similar legislation providing analogous good faith immunity and requiring those who respond to reports of pet-related injuries (*e.g.*, physicians, humane and animal control officials, public health workers, veterinarians, etc.) to report suspected animal or domestic abuse.[418] States should also consider enacting legislation that mandates educational training on the link between animal cruelty and domestic violence for healthcare professionals, law enforcement officials, social workers, physicians, animal control officers, veterinarians, elementary and secondary school teachers, and judicial officers. To the extent the law permits, adoption agencies should be required to notify potential adoptive parents and foster parents of a child's history of animal abuse.[419]

CONCLUSION

U.S. v. Stevens has altered the legal landscape of animal rights, and the impact of the decision is far-reaching. In response to the decision, Congress enacted a much narrower and arguably less protective statute that will exclude depictions of animal fighting and other non-obscene extreme animal cruelty from its coverage. Just as the Third Circuit misinterpreted *Lukumi* to indicate that preventing animal cruelty does not constitute a compelling government interest, so, too, could lower courts and members of the public erroneously interpret *Stevens* to challenge state anti-cruelty laws with language similar to Section 48. As such, *Stevens* may undo or at least slow the progress that Section 48 had achieved in preventing animal cruelty.[420] Although the Crush Act is

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[415] *See id*. at 64.
[416] *Wounded Hearts*, *supra* note 249, at 16 (showing that research indicated that pets had "injured a family member in 69% of the home with both animal and child abuse, compared to only 6% of the non-abusive homes").
[417] *Id.*
[418] *Id.* at 17 ("Animal control officers and state humane officers are mandated reporters of suspected child abuse in California.").
[419] *See Youth Violence*, *supra* note 210.
[420] United States v. Stevens, 130 S. Ct. 1577, 1592 (2010) (Alito, J., dissenting) ("The Court's approach, which has the practical effect of legalizing the sale of

undoubtedly a step in the right direction, it will likely be less effective at chilling unlawful activity, not only because of its much narrower scope but also because in the wake of *Stevens*, filmmakers and purchasers may assume that it, too, will ultimately be invalidated. In *Stevens*, a bad thing happened to a good law, and we may all suffer the consequences.

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such videos and is thus likely to spur a resumption of their production, is unwarranted.").