

**UNITED STATES V. STEVENS: A PROPOSAL FOR
CRIMINALIZING CRUSH VIDEOS UNDER CURRENT FREE
SPEECH DOCTRINE**

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*“Of all the animals, man is the only one that is cruel. He is the only one that inflicts pain for the pleasure of doing it.”*¹

–Mark Twain

*“If the freedom of speech is taken away then dumb and silent we may be led, like sheep to the slaughter.”*²

–George Washington

INTRODUCTION

A leading First Amendment scholar recently remarked: “[D]uring the latter part of the twentieth century, the contours of the First Amendment have been defined not as much by politics as by smut.”³ If the Supreme Court’s recent decision in *United States v. Stevens*⁴ is any indication, the vilest, most offensive speech will continue to animate free speech jurisprudence throughout the twenty-first century as well.

In *Stevens*, the Court invalidated a federal statute (18 U.S.C. § 48) that criminalized the commercial creation, sale, or possession of certain depictions of animal cruelty.⁵ The statute, as written, was broad-sweeping in scope. It applied to any visual or auditory depiction “‘in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed,’ if that conduct violates federal or state law where ‘the creation, sale, or possession takes place.’”⁶ The statute did, however, purport to exempt any depictions of animal cruelty with “serious religious, political, scientific, educational, journalistic, historical, or artistic value.”⁷

* Associate, Litigation Practice Group, Paul Frank & Collins, P.C. This Article is dedicated to Strider, a pure-hearted pit-bull rescue who defied all stereotypes and taught our family the meaning of life, love, loyalty, and loss.

1. Mark Twain, *The Damned Human Race*, in LETTERS FROM THE EARTH 209, 225–26 (Bernard DeVoto ed., 1962).

2. GREAT QUOTES FROM GREAT LEADERS 64 (Peggy Anderson ed., 1990).

3. *Media and the Law Symposium: When Does Government Regulation Go Too Far?*, 22 REGENT U. L. REV. 383, 396–97 (2009–2010) (commentary by Professor Levi).

4. *United States v. Stevens*, 130 S. Ct. 1577 (2010).

5. *Id.* at 1592.

6. *Id.* at 1582 (quoting 18 U.S.C. § 48(c)(1) (2006), *invalidated by United States v. Stevens*, 130 S. Ct. 1577 (2010)).

7. *Id.* at 1583 (quoting 18 U.S.C. §48(b)).

According to the legislative history, the driving force behind § 48 was the interstate market for “crush videos.” Crush videos depict women, from the knees down, slowly torturing, crushing, and eventually killing animals such as cats, dogs, monkeys, rabbits, mice, and hamsters with stiletto shoes or their bare feet.⁸ Often the women are heard “talking to the animals in a kind of dominatrix patter” over “[t]he cries and squeals of the animals, obviously in great pain.”⁹ Crush videos appeal to those with a specific fetish who find the content sexually arousing.¹⁰ The sample crush video provided to the Court in *Stevens* depicted the following scene:

[A] kitten, secured to the ground, watches and shrieks in pain as a woman thrusts her high-heeled shoe into its body, slams her heel into the kitten’s eye socket and mouth loudly fracturing its skull, and stomps repeatedly on the animal’s head. The kitten hemorrhages blood, screams blindly in pain, and is ultimately left dead in a moist pile of blood-soaked hair and bone.¹¹

These videos are so nauseating as to give even the staunchest free speech advocates pause. They are the product of the most depraved and sadistic elements in our society. Their very existence is a disturbing reminder of humankind’s insatiable lust for violence and utter contempt for innocent life.

But all is not lost. In fact, the Court in *Stevens* correctly held that § 48 could not survive a facial challenge on overbreadth grounds because it reached a substantial amount of protected speech, such as hunting videos and magazines.¹² Stevens himself had been convicted under § 48 for selling dogfighting videos, not crush videos.¹³ By chalking up the constitutional problem to one of clumsy draftsmanship, the Court dodged the more substantive issues of whether: (1) crush videos constitute a category of speech that deserves no constitutional protection whatsoever; and (2) whether Congress has a “compelling interest” in criminalizing the production, sale, or possession of crush videos even if they fall within the protective ambit of the First Amendment. This Article examines the Court’s decision in *Stevens* and explains why a criminal statute carefully tailored to crush videos would pass constitutional muster without any corresponding dilution of current free speech doctrine.

8. *Id.* at 1583 (citing H.R. REP. NO. 106-397, at 2–3) (1999) [hereinafter HOUSE REPORT].

9. *Id.* (quoting HOUSE REPORT, *supra* note 8, at 2).

10. *Id.* (citing HOUSE REPORT, *supra* note 8, at 2–3).

11. *Id.* at 1598 (Alito, J., dissenting) (quoting Brief for Humane Soc’y of United States as Amicus Curiae Supporting Petitioner at 2, *United States v. Stevens*, 130 S. Ct. 1577 (2010) (No. 08-769)).

12. *Id.* at 1589.

13. *Id.* at 1583.

I. THE *STEVENS* DECISION

In March of 2004, Robert Stevens was indicted by a federal grand jury on three counts of violating § 48 for knowingly selling videos of pit bulls engaging in dogfights and attacking other animals.¹⁴ The District Court denied his motion to dismiss the indictment on First Amendment grounds and the case proceeded to trial.¹⁵ The jury returned a guilty verdict on all counts, the court sentenced Stevens to 37 months of imprisonment, and he appealed.¹⁶

In an *en banc* ruling over a three-judge dissent, the Third Circuit Court of Appeals declared the statute unconstitutional and vacated Stevens' conviction.¹⁷ The Third Circuit rejected the government's invitation to recognize a new category of unprotected speech for depictions of animal cruelty as a class. Instead, the court subjected the statute to strict scrutiny as a content-based restriction on speech and held that the statute could not withstand the rigors of heightened review.¹⁸ The court reasoned that, "while Government can and does protect animals from acts of cruelty, to make possession of films of such acts illegal would infringe upon the free speech rights of those possessing the films."¹⁹ It concluded that the government did not have a "compelling interest" in regulating such depictions because "animal rights do not supersede fundamental human rights."²⁰

The Third Circuit further noted that the statute "might also be unconstitutionally overbroad" even if crush videos were constitutionally proscribable.²¹ The court observed that "[t]he statute potentially covers a great deal of constitutionally protected speech," such as depictions of bullfighting in Spain, hunting or fishing out of season, or hunting in the District of Columbia (where hunting is prohibited).²² The Third Circuit's decision was based primarily on a review of the statute as applied to all qualifying depictions of animal cruelty. It deliberately left the crush video question for another day.²³

14. *United States v. Stevens*, 533 F.3d 218, 220 (3d Cir. 2008) (*en banc*).

15. *Id.* at 221.

16. *Id.*

17. *Id.* at 220.

18. *Id.* at 226.

19. *Id.* at 226–27.

20. *Id.* at 226.

21. *Id.* at 235 n.16.

22. *Id.*

23. *Id.* at 224 n.5 ("We do not address the constitutionality of a hypothetical statute that would only regulate crush videos.").

Following the Third Circuit's ruling, the Supreme Court granted the government's petition for certiorari.²⁴ Like the Court of Appeals, the Supreme Court dispelled the notion that all depictions of animal cruelty were subject to unbridled governmental regulation as unprotected speech.²⁵ Therefore, it addressed the constitutionality of the statute under the assumption that at least some depictions of animal cruelty have expressive value sufficient to trigger the kind of heightened scrutiny applicable to all content-based restrictions on speech.

In any other context, mounting a facial challenge on overbreadth grounds is exceedingly difficult, as the challenger must show that the law is not constitutionally valid under *any* set of circumstances.²⁶ In the free speech context, however, the Court has held that a law may be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to [its] plainly legitimate sweep."²⁷ The substantial-overbreadth standard allows the Court to interpret the meaning and scope of a statute and entertain hypothetical applications in order to determine whether the statute impermissibly restricts—or has a "chilling effect" on—constitutionally protected speech.²⁸ Under this analytic framework, § 48 was easy prey for the Court.

The Court remarked that the statute was "a criminal prohibition of alarming breadth."²⁹ Despite the general ban on depictions of animal cruelty, the statute failed to require that the depicted conduct even be "cruel" in some way.³⁰ While § 48 did require that the conduct be illegal, *unlawful* conduct is not necessarily synonymous with *cruel* conduct. The Court opined that one could violate basic livestock regulations, endangered species laws, and hunting/fishing regulations (none of which target cruel acts *per se*), and yet still be subject to prosecution under the plain meaning of § 48.³¹

In addition, the Court observed that § 48 effectively criminalized conduct that was otherwise permitted in all but one jurisdiction. In criminalizing depictions of conduct that was illegal in the jurisdiction in which the creation, sale, or possession takes place, the statute "allow[ed]

24. *Id.*, *cert. granted*, 129 S.Ct. 1984 (2009).

25. *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010).

26. *Id.* at 1587 (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

27. *Id.* (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)).

28. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244–55 (2002) (discussing constitutional protection from overbroad laws in the context of the First Amendment).

29. *Stevens*, 130 S. Ct. at 1588.

30. *Id.*

31. *Id.*

each jurisdiction to export its laws to the rest of the country.”³² To illustrate this overbreadth problem, the Court pointed to the District of Columbia in which all hunting is prohibited and deduced that § 48 would “extend[] to *any* magazine or video depicting lawful hunting, so long as that depiction is sold within the Nation’s Capital.”³³

The Court also held that the statute’s “serious-value” exception posed serious constitutional problems. The serious-value standard has its origins in the Court’s “obscenity” jurisprudence.³⁴ Congress inserted it into § 48 in an attempt to classify depictions of animal cruelty as unprotected speech and to narrow its application to the most extreme cases.³⁵ The Court had originally fashioned the serious-value standard in order to shield depictions of sex (protected speech) from regulation as obscenity (unprotected speech).³⁶ By protecting obscene material that has “serious literary, artistic, political, or scientific value,”³⁷ the Court sought to ensure that only the most offensive, prurient, and worthless depictions of sexual conduct would be subject to regulation as obscenity. This standard, however, is endemic to obscenity law and has never been applied to any other forms of speech or expressive activity. The Court has never implied that speech only deserves constitutional protection if it has serious value.³⁸ As the Court in *Stevens* put it: “*Most* of what we say to one another lacks ‘religious, political, scientific, educational, journalistic, historical, or artistic value’ (let alone serious value), but it is still sheltered from government regulation.”³⁹ The exceptions clause of § 48 took the Court’s serious-value standard completely out of context. It also failed to provide the safe harbor Congress had intended. It did not, for example, shield ordinary hunting videos or magazines, as they typically depict only *recreational* activity and have no “serious religious, political, scientific, educational, journalistic, historical, or artistic value.”⁴⁰

In a last-ditch effort to save the statute, the government represented to the Court that the Executive Branch would construe § 48 to reach only “extreme” acts of cruelty, such as those depicted in crush videos and dogfighting videos.⁴¹ Invoking the dubious defense of executive self-

32. *Id.* at 1589.

33. *Id.*

34. *Id.* at 1591.

35. *Id.*

36. *See id.* (citing *Miller v. California*, 413 U.S. 15, 24 (1973)).

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

38. *Stevens*, 130 S. Ct. at 1591.

39. *Id.*

40. *Id.* at 1590.

41. *Id.* at 1591.

restraint in this area—where the Court is hypersensitive to the chilling effect of governmental regulations as written—is really just whistling past the graveyard. The Court soundly and swiftly dispelled the notion that constitutional rights should hinge on a prosecutor’s whims or rise and fall with the shifting politics of successive administrations.⁴²

For all of the foregoing reasons, *Stevens* was rightly decided. In fact, it was a relatively easy case to decide because of Congress’s shoddy and inartful draftsmanship. The overbreadth doctrine furnished the perfect pretext for avoiding the more controversial and politically divisive constitutional question. In quintessential minimalist fashion, the Court stated: “We . . . need not and do not decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional.”⁴³

II. CRUSH VIDEOS AS UNPROTECTED SPEECH

The Free Speech Clause, by its plain and inescapable terms, protects only *speech*; it does not prevent the government from criminalizing *action*. The statute at issue in *Stevens* implicated issues of a constitutional caliber because it targeted expressive portrayals of criminal acts rather than the acts themselves.⁴⁴ Although the reprehensible acts depicted in crush videos are punishable under the anti-animal-cruelty laws of all fifty states and the District of Columbia, the perpetrators are difficult, if not impossible, to prosecute under existing anti-animal-cruelty laws.⁴⁵ Congress enacted § 48 on the basic premise that a crush video ban would cripple the entire industry

42. *Id.* Specifically, the Court in *Stevens* declared:

[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly. This prosecution is itself evidence of the danger of putting faith in government representations of prosecutorial restraint. When this legislation was enacted, the Executive Branch announced that it would interpret § 48 as covering only depictions ‘of wanton cruelty to animals designed to appeal to a prurient interest in sex.’ No one suggests that the videos in this case fit that description. The Government’s assurance that it will apply § 48 far more restrictively than its language provides is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading.

Id. (citations omitted).

43. *Id.* at 1592.

44. *Id.* at 1582 (“The statute does not address underlying acts harmful to animals, but only portrayals of such conduct.”).

45. *Id.* at 1583 (citing HOUSE REPORT, *supra* note 8, at 3) (recognizing that “crush videos rarely disclose the participants’ identities, inhibiting prosecution of the underlying conduct”).

and thereby remove the market-driven incentive to commit the crimes for commercial gain.⁴⁶

Unlike many other depictions of animal cruelty, crush videos are produced clandestinely without a live audience, the faces of the women inflicting the torture are not shown, and the dates and locations of the crimes are not disclosed.⁴⁷ Law enforcement authorities can almost never successfully identify and arrest these offenders, and even when they do, the prerequisites for a conviction—positive identification, personal jurisdiction, and the statute of limitations—are virtually impossible to establish.⁴⁸ The only efficacious means of punishing and deterring the conduct portrayed in crush videos is to dry up the market for them by targeting the production, sales, promotion, and distribution network of the industry as a whole.⁴⁹

The Court approaches all content-based restrictions on speech with a hawkish eye. Content-based regulations are presumed invalid because they are aimed at silencing a speaker *because of* the message he or she is attempting to convey (as opposed to simply regulating the time, place, or manner of the speech).⁵⁰ Historically, the Court has embraced a hierarchical approach to speech depending on its relative social value and its qualitative proximity to the “core” meaning of the First Amendment. As the engine of our democracy, political speech comprises the absolutist core of the Free Speech Clause and is impervious to government regulation.⁵¹ The Court has recognized that the “central meaning” of the First Amendment is that speech on public issues should be “uninhibited, robust, and wide-open.”⁵² Other forms of expression are theoretically subject to content regulation but will nonetheless trigger heightened scrutiny.⁵³ In practice, even non-core, low-value speech has been scrupulously guarded by the federal judiciary.⁵⁴

46. *See id.* at 1598 (Alito, J., dissenting) (citing HOUSE REPORT, *supra* note 8, at 3).

47. *Id.* at 1598.

48. *Id.*

49. *Id.*

50. *See Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004) (holding that content-based restrictions on speech are presumptively unconstitutional); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (“It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.”) (citation omitted).

51. Political speech involves forms of expression “relating to any matter of political, social, or other concern to the community.” *Connick v. Myers*, 461 U.S. 137, 146 (1983). The Court has declared that “speech concerning public affairs is more than self-expression; it is the essence of self-government.” *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).

52. *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964).

53. *See, e.g., United States v. Playboy Entm’t. Grp.*, 529 U.S. 803, 818 (2000) (“It is rare that a regulation restricting speech because of its content will ever be permissible. Indeed, were we to give the Government the benefit of the doubt when it attempted to restrict speech, we would risk leaving regulations in place that sought to shape our unique personalities or to silence dissenting ideas.”).

54. *See Barry P. McDonald, Speech and Distrust: Rethinking the Content Approach to Protecting*

The Court has proclaimed that “[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [First Amendment].”⁵⁵ Over the last half-century, the Court’s free speech jurisprudence has been animated by the principles invoked by Justice Brandeis in *Whitney v. California*:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form.⁵⁶

The Court has, however, carved certain categories of speech out of the First Amendment entirely, either because the speech is inextricably intertwined with criminal conduct or because its “slight social value . . . is clearly outweighed by the social interest in order and morality.”⁵⁷ To date, the Court has recognized four categories of speech that deserve no constitutional protection whatsoever. They are: (1) defamatory statements directed at private persons relating to matters of private concern;⁵⁸ (2) speech integral to criminal conduct (such as threats, fraud, conspiracy and incitement of imminent illegal activity);⁵⁹ (3) obscenity;⁶⁰ and (4) child pornography

the Freedom of Expression, 81 NOTRE DAME L. REV. 1347, 1365 n.63 (2006) (noting that “a majority of the Court has never sustained a regulation that was strictly scrutinized for content discrimination reasons”).

55. *Roth v. United States*, 354 U.S. 476, 484 (1957).

56. *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring). This term, in *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), the Court held that certain peaceful yet targeted picketing of military funerals featuring offensive speech on public issues is constitutionally immune from State-imposed tort liability. The Court in *Snyder* reaffirmed the Brandeisian justification for speech protection:

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great [emotional] pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.

Id. at 1220.

57. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

58. *See Beauharnais v. Illinois*, 343 U.S. 250, 263 (1952).

59. *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (citing *Gibency v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)) (summarizing cases and stating that “speech integral to criminal conduct” is not protected by the First Amendment).

60. *See Miller v. California*, 413 U.S. 15, 24 (1973).

depicting actual child victims.⁶¹ The general principle distilled from the case law is that unprotected speech must have extremely low or *de minimis* social value, and the government must have a compelling interest in restricting it.⁶²

As with § 48, a criminal prohibition limited only to crush videos would undoubtedly be a content-based restriction, as it would ban visual and auditory depictions because of the substantive content or the message conveyed. The question, then, is whether crush videos are protected or unprotected speech. If they are categorically unprotected, then Congress may criminalize their production, sale, and possession without running afoul of the First Amendment. If they are protected, the question is whether a crush-video ban would survive strict scrutiny.

In *Brandenburg v. Ohio*, the Court held that advocating the use of force or unlawful conduct can only be prohibited “where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁶³ *Brandenburg* recognized that certain forms of speech can become such powerful springboards for immediate illegal behavior that the government may punish the speaker. However, the “incitement” doctrine has been sharply circumscribed in more recent years.

In *Ashcroft v. Free Speech Coalition*, the Court invalidated a federal ban on “virtual” child pornography.⁶⁴ The statute applied to pornographic images of computer-generated children or adults dressed to look like children. The pornography did not depict real children, but the government argued that the content alone would incite viewers to sexually abuse children.⁶⁵ The Court found insufficient empirical evidence regarding the imminence and likelihood of such harm and articulated an exceedingly narrow view of *Brandenburg*:

The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. The government “cannot constitutionally premise legislation on the desirability of controlling a person’s private thoughts.” . . . The government may not prohibit speech because it increases the *chance* an unlawful act will be committed “at some *indefinite* future time.” . . . The Government has shown no more than a remote connection between speech that might encourage thoughts or

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

62. See *id.* at 776 (Brennan, J., concurring) (“[T]he limited classes of speech, the suppression of which does not raise serious First Amendment concerns, have two attributes. They are of exceedingly ‘slight social value,’ and the State has a compelling interest in their regulation.”) (citation omitted).

63. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

64. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 258 (2002).

65. *Id.* at 241.

impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct.⁶⁶

There is no question that crush videos are violent speech, as are many movies, video games, and television shows. But the relationship between violent speech and the viewer's future violent behavior—like the relationship between viewing child pornography and raping children—is speculative, remote, and often contingent on a confluence of other variables that may have nothing to do with the speech itself. The First Amendment requires a much closer causal and temporal nexus between pure speech and subsequent unlawful action.⁶⁷ There is no evidence that those who watch crush videos immediately and invariably harm animals themselves. In fact, the videos appeal to a “very unique sexual fantasy” in which the viewer engages in a kind of vicarious masochism by identifying with the animals.⁶⁸ Some “crush” fetishists want to be stepped on and squashed by the foot of a woman;⁶⁹ they do not necessarily want to be the woman inflicting pain. Thus, the causal link between watching crush videos and engaging in animal cruelty is even more attenuated.

Although crush videos do not mesh with the “incitement” paradigm, they share a closer connection to criminal activity than even *Brandenburg* contemplates.⁷⁰ Whereas incitement doctrine permits restrictions on speech that incites others to commit some *future* (albeit imminent) crime, crush videos depend, for their existence, on a *predicate* criminal act. Crime is an indispensable and indelible component of all crush videos because the women in the videos commit premeditated acts of animal cruelty for the purpose of marketing their depiction.⁷¹ Indeed, there are very few other forms of expression so innately rooted in criminality.⁷² Crush videos, therefore, fall within the broader category of unprotected speech regarded as “integral to criminal conduct.”⁷³

66. *Id.* at 253–54 (emphasis added) (citations omitted).

67. Joseph J. Anclien, *Crush Videos and the Case for Criminalizing Criminal Depiction*, 40 U. MEM. L. REV. 1, 14 (2009).

68. MAY BERENBAUM, BUZZWORDS: A SCIENTIST MUSES ON SEX, BUGS, AND ROCK ‘N’ ROLL 18 (2000) (quoting Jeff Vilencia, editor of AMERICAN JOURNAL OF THE CRUSH FREAK (1993)).

69. *Id.* at 18–19.

70. Anclien, *supra* note 67, at 15.

71. *Id.* at 17.

72. *See id.* at 49–52 (placing crush videos in a small class of “criminal depictions” that would include child pornography using actual children, snuff films, coerced pornography, and certain videos of actual assaults).

73. *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010).

Some commentators have argued that crush videos may be classified as “obscenity” under *Miller v. California*.⁷⁴ The fact that the exceptions clause in § 48 was extracted almost verbatim from *Miller* reveals a congressional consensus that crush videos are analogous to obscenity.⁷⁵ Even the Third Circuit in *Stevens* stated in dicta that a prohibition limited to crush videos “might target obscenity under the *Miller* test because crush videos appeal to a prurient interest.”⁷⁶ Although *Miller* defines obscene material as that which appeals to a prurient interest, this is where the analogy to crush videos ends. *Miller* also requires that a work depict or describe “sexual conduct in a patently offensive” manner.⁷⁷ The Court in *Miller* stated that obscene material should depict “ultimate sexual acts” such as “masturbation” or “lewd exhibition of the genitals.”⁷⁸ Crush videos, on the other hand, do not show sex acts, genitalia, or even nudity for that matter. They show women, from only the knees down, engaging in brutal acts of animal cruelty. Although they are offensive, crush videos simply do not satisfy the *Miller* test for obscenity.⁷⁹

The Court has cabined *Miller* to depictions of graphic sex acts⁸⁰ and is unlikely to extend *Miller* any further. Whereas all other forms of unprotected speech have been found to cause significant and tangible harm to others, obscenity falls outside the First Amendment merely because it offends social mores and sensibilities. The Court itself has characterized the government’s intangible interest in promoting a sense of public morality and decency as “paternalistic.”⁸¹ *Miller*’s continued vitality is questionable in light of the Court’s firm adherence to the principle that “Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”⁸² Obscenity doctrine should not be expanded to reach violent (as opposed to sexual) criminal depictions such as crush videos, especially given the availability of other more defensible doctrinal formulas.

74. See, e.g., Kerry Adams, *Punishing Depictions of Animal Cruelty: Unconstitutional or a Valid Restriction on Speech?*, 12 BARRY L. REV. 203, 221–23 (2009) (stating that a prohibition properly tailored to crush videos would satisfy the *Miller* “obscenity” test).

75. See *Stevens*, 130 S. Ct. at 1591 (“The Government explains that the language of § 48(b) was largely drawn from our opinion in *Miller v. California*.”).

76. *United States v. Stevens*, 533 F.3d 218, 224 n.5 (3d Cir. 2008) (en banc).

77. See *Miller v. California*, 413 U.S. 15, 24 (1973).

78. *Id.* at 25.

79. Anclien, *supra* note 67, at 7.

80. See *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 959 (9th Cir. 2009), *cert. granted sub nom Schwarzenegger v. Entm’t Merchs. Ass’n*, 130 S. Ct. 2398 (2010) (“The Supreme Court has carefully limited obscenity to sexual content.”); *Miller*, 413 U.S. at 24 (“[W]e now confine the permissible scope of such regulation to works which depict or describe sexual conduct.”).

81. *Osborne v. Ohio*, 495 U.S. 103, 109 (1990).

82. *United States v. Eichman*, 496 U.S. 310, 319 (1990) (citing *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

In the seminal case of *New York v. Ferber*, the Court held that child pornography (whether obscene under *Miller* or not) fell into its own distinct category of low-value, unprotected speech.⁸³ In permitting the state to criminalize *depictions* of objectionable conduct, both *Miller* and *Ferber* blur the speech/action distinction at the center of free speech jurisprudence.⁸⁴ However, *Ferber* is far more principled and judicially manageable than *Miller* on several fronts.

Ferber acknowledged that the State has a compelling interest in protecting children from physical and psychological harm.⁸⁵ Unlike obscenity, child pornography results in direct and tangible harm because it depicts sex acts performed on victims incapable of consent. The Court in *Ferber* observed that child pornography is “intrinsically related” to the sexual abuse of children because an actual crime—not merely its depiction or simulation—is a necessary and inseparable component of the speech itself.⁸⁶ It reasoned that the advertisement and sale of child pornography “provide an economic motive for and are thus an integral part of the [crime].”⁸⁷ The Court agreed that the production of child pornography is a “low-profile, clandestine industry” that can only be destroyed by criminalizing its more visible promotion and distribution network.⁸⁸

Although the use of children in pornographic films and magazines was illegal throughout the country when *Ferber* was decided, these laws were woefully inadequate in eradicating the commercial market for child pornography.⁸⁹ This prompted the Court to grant law enforcement authorities significant latitude in targeting the distribution, sale, and advertisement of child pornography free of First Amendment strictures. The Court agreed that “[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.”⁹⁰ Finally, the Court estimated that the potential value of such speech is “exceedingly modest, if not *de minimis*.”⁹¹

Ferber has been reaffirmed by the Court on several occasions. In fact, the Court in *Stevens* explained that *Ferber* was solidly grounded in that

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

84. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (“[T]he Court’s First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct.”).

85. *Ferber*, 458 U.S. at 756–57.

86. *Id.* at 759–61.

87. *Id.* at 761.

88. *Id.* at 760.

89. *See id.* (citation omitted).

90. *Id.*

91. *Id.* at 762.

“long-established category of unprotected speech” that includes “speech or writing used as an integral part of conduct in violation of a valid criminal statute.”⁹² *Ferber* involved a form of speech that was not only indissolubly linked to a serious crime, but also increased the commercial demand for such crime.⁹³

The ironclad bond between the speech and the crime from which it emanates is the lynchpin and limiting principle of *Ferber*. Unlike “virtual” child pornography or violent movies, real child pornography and crush videos involve real victims and crime that cannot otherwise be effectively detected, deterred, or prosecuted. In both cases, crime is the *sine qua non* of the speech-laden end-product. Because animals can be tortured and killed with impunity in the secretive crush-video underworld, this macabre blood-sport will continue in a manner commensurate with market demand unless its more transparent, expressive manifestations are targeted. Under the *Ferber* rationale, “the creation of the speech is itself the crime” and “the prohibition deters the crime by removing the profit motive.”⁹⁴

III. JUSTICE ALITO’S DISSENT IN *STEVENS*

In a lone dissent, Justice Alito addressed the constitutionality of § 48 as applied specifically to crush videos. He pointed out that “[c]rush 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.”⁹⁵ He further asserted that Congress had marshaled “compelling evidence that the only way of preventing these crimes was to target the sale of the videos.”⁹⁶

In *Stevens*, the Third Circuit had distinguished *Ferber*, stating that “[p]reventing cruelty to animals . . . simply does not implicate interests of the same magnitude as protecting children from physical and psychological harm.”⁹⁷ Justice Alito conceded that, “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.”⁹⁸ He pointed to the societal consensus against animal cruelty as evidenced by the long history of anti-animal-cruelty laws throughout the

92. *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010).

93. Anclien, *supra* note 67, at 18–19.

94. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 254 (2002).

95. *Stevens*, 130 S. Ct. at 1599 (Alito, J., dissenting).

96. *Id.*

97. *United States v. Stevens*, 533 F.3d 218, 228 (3d Cir. 2008) (en banc).

98. *Stevens*, 130 S. Ct. at 1600 (Alito, J., dissenting).

nation,⁹⁹ and invoked well-settled precedent in which “evidence of a national consensus” was “proof that a particular government interest is compelling.”¹⁰⁰ He also observed that, in the First Amendment context, “[w]e have already judged that taking the profit out of crime is a compelling interest.”¹⁰¹

The Third Circuit erroneously analyzed the gravity of the governmental interest at stake by accentuating the obvious differences between humans and animals.¹⁰² However, the severity of the crime has not been a dispositive factor in cases involving speech indivisibly wedded to criminal conduct. *Ferber* recognized child pornography as an integral part of the underlying sex crimes because the speech was an economic catalyst to commit the crimes. The Court’s decision in *Ferber* depends less on the magnitude of the crime portrayed, and more on the inseparable relationship between the speech and the crime.¹⁰³ The compelling nature of the governmental interest arose from a legitimate law-enforcement need to dry up the market for an otherwise elusive criminal enterprise.

Of course, implicit in *Ferber* is the notion that the crimes must constitute serious, *mala in se* offenses in order for the government to have a compelling interest in targeting their end-products. As applied to films that depict victimless *mala prohibita* acts, such as speeding or trespassing in a neighbor’s garden patch, the governmental interest is not truly compelling. But such transgressions are a far cry from the sexual exploitation of children incapable of consent and the torture of animals incapable of defending themselves. The acts committed in crush videos and child pornography are inherently injurious and—in the case of crush videos—result in a prolonged and painful death.

Justice Alito was correct in stating that crush videos fall squarely within the *Ferber* framework. As in *Ferber*, laws targeting the crushing acts

99. *Id.*

100. *Id.* at 1600 n.6.

101. *Id.* at 1601.

102. *Stevens*, 533 F.3d at 232. The Third Circuit was also mistaken in presuming that animal cruelty laws do not implicate human interests. *Id.* at 227. Empirical data strongly suggest that those who perpetrate animal cruelty eventually graduate to violence against humans. See Elizabeth L. Kinsella, *A Crushing Blow: United States v. Stevens and the Freedom to Profit from Animal Cruelty*, 43 U.C. DAVIS L. REV. 347, 378–81 (2009) (arguing that although predictions of anti-social behavior would not be a valid reason to restrict depictions of animal cruelty as protected speech, such evidence demonstrates why a governmental interest in preventing acts of animal cruelty serves to protect the well-being of humans and animals alike).

103. Anclien, *supra* note 67, at 18–19. If anything, the nexus between crush videos and animal cruelty is even more ironclad than the relationship between child pornography and sexual abuse. In order to make a crush video, one *must* engage in a criminal act of animal cruelty. On the other hand, not all child pornography must depict the sexual abuse of children by adults. It could, for example, feature seemingly consensual conduct between two 17-year-old participants.

themselves are inefficacious due to the secretive, subterranean market for crush videos and the undisputed fact that the perpetrators almost never show their faces in the videos.¹⁰⁴ The women who kill animals in crush videos do so for the sole purpose of creating a product and injecting it into the stream of commerce in order to turn a profit. As with child pornography, the crush video industry is built on crime and creates a continuing commercial demand for crime that can only be effectively deterred and punished if the production and distribution network is shut down. Also, the relative value of such speech hardly weighs in favor of its protection. Even the most detached observer would conclude that the social value of torturing and killing animals in crush videos, like using children in sex videos, is nonexistent.¹⁰⁵

For these reasons, a properly crafted ban on crush videos would be constitutional, either under *Ferber* (as a regulation of unprotected speech) or under traditional strict scrutiny analysis (as a regulation of protected speech). Crush videos bear all the hallmarks of unprotected speech under *Ferber* and the related line of cases involving speech integral to criminal conduct. But even if crush videos constituted protected speech, a meticulously crafted prohibition would survive heightened scrutiny. Such a regulation would, by definition, be narrowly tailored to serve a compelling interest in combating a singularly lucrative market for criminal acts of animal cruelty. Rather than target all depictions of animal cruelty, it would be reasonably calculated to criminalize a small subset of expressive activity that perpetrates and promotes crime in a manner that is particularly repulsive and nearly impossible to prosecute through other, less restrictive law enforcement methods. In sum, the Court could uphold the constitutionality of a limited crush video ban without emasculating current free speech doctrine in any way.

IV. STRIKING A BALANCE BETWEEN FREE SPEECH AND ANIMAL RIGHTS

Laws regarding the humane treatment of animals date back to the infancy of our republic.¹⁰⁶ Today, all 50 states have anti-animal-cruelty laws that impose serious criminal penalties.¹⁰⁷ It is undeniable that domestic animals, particularly dogs and cats, occupy a prominent place in our families and communities—perhaps now more than ever. Tell-tale signs of

104. *Stevens*, 533 F.3d at 228–29 n.8 (citing HOUSE REPORT, *supra* note 8, at 3).

105. See Anclien, *supra* note 67, at 23.

106. *Stevens*, 533 F.3d at 238–39 (Cowen, J., dissenting).

107. See *United States v. Stevens*, 130 S. Ct. 1577, 1602 (2010) (Alito, J., dissenting) (appendix of all state laws prohibiting animal cruelty).

our growing appreciation and love of animals are ubiquitous. John Grogan's "Marley & Me," a novel about an unruly and unforgettable Labrador retriever, has become an international bestseller with over five million copies sold.¹⁰⁸ The public outrage over Michael Vick's operation of a pit-bull fighting ring could hardly have been more widespread or intense. His sentence of nearly two years' incarceration and three years' probation is proof that even the courts have no tolerance for those who inflict needless pain and suffering on animals.¹⁰⁹ Our pets are sentient creatures capable of most forms of human feeling—pain, grief, anger, excitement, loneliness, affection, and even compassion—and we have bestowed on them a moral status that is perhaps still in the nascent stages of development.

While the Constitution excludes animals from our political community and courts continue to define them as personal property,¹¹⁰ the Court should not second-guess a pronounced and universal legislative judgment that the protection of animals from senseless acts of cruelty is among the more important goals in our society. There is an "overwhelming body of law reflect[ing] the 'widespread belief that animals, as living things, are entitled to certain minimal standards of treatment by humans.'"¹¹¹ An animal's worth is not primarily financial. In fact, measured in strictly monetary terms, many animals saddle their owners with sizable net losses. Their worth derives from their human-like qualities and their emotional relationship with their human companions. In this sense, animals defy classification as mere personal property. As the Vermont Supreme Court recently declared:

[P]ets occupy a legal realm somewhere between chattel and children. Unlike inanimate objects, pet owners do not enjoy unfettered use of their property. The ownership interest in 'domestic pets is of a highly qualified' nature due to the legal

108. *About John Grogan*, JOHN GROGAN, <http://www.johngroganbooks.com/about.html> (last visited Apr. 14, 2011).

109. *Michael Vick Sentenced to 23 Months in Jail for Role in Dogfighting Conspiracy*, FOXNEWS.COM, Dec. 10, 2007, <http://www.foxnews.com/story/0,2933,316319,00.html>; *see also Apogetic Vick gets 23-month Sentence on Dogfighting Charges*, ESPN.COM, Dec. 10, 2007, <http://sports.espn.go.com/espn/print?id=3148549&type=story>.

110. *See, e.g., City of Toledo v. Tellings*, 871 N.E.2d 1152, 1156 (2007) ("Despite the special relationships that exist between many people and their dogs, dogs are personal property, and the state or the city has the right to control those that are a threat to the safety of the community"); *see also Sentell v. New Orleans & Carrollton R.R. Co.*, 166 U.S. 698, 704 (1897) ("Even if it were assumed that dogs are property in the fullest sense of the word, they would still be subject to the police power of the State, and might be destroyed or otherwise dealt with, as in the judgment of the legislature is necessary for the protection of its citizens.").

111. *Stevens*, 533 F.3d at 239 (Cowen, J., dissenting) (quoting HOUSE REPORT, *supra* note 8, at 4).

controls the law imposes. The Legislature has dedicated dozens of laws to the appropriate protection and control of animals and shown particular concern for domestic pets. Such statutes, singling animals out for unique protection, date back well into the last century. . . . [A] person would face no criminal charges for ignoring their garden during a hot, dry summer or overloading a bookshelf to the point of collapse. Yet like treatment of a pet or other animal could result in incarceration or thousands of dollars in fines.¹¹²

Free speech purists may hesitate, as the Third Circuit did, to allow animals any inroads into First Amendment territory. But criminalizing crush videos does not present a Hobson's choice between free speech rights and a basic concern for animal welfare. Even in this area, where governmental regulations undergo the most rigorous review and judicial deference to congressional fact-finding is at its lowest ebb, a narrowly tailored prohibition of crush videos could be upheld without diluting existing free speech doctrine.

V. THE ANIMAL CRUSH VIDEO PROHIBITION ACT OF 2010

Prior to the enactment of § 48, the crush video industry produced an estimated \$1 million in annual video sales.¹¹³ Because of § 48, the crush video industry had been pronounced dead by 2007.¹¹⁴ Soon after the Third Circuit invalidated the statute in 2008, the industry sprang back to life.¹¹⁵ Fortunately, Congress returned to the drawing board immediately on the heels of *Stevens* and passed H.R. 5566, entitled "Animal Crush Video Prohibition Act of 2010."¹¹⁶ The original bill sailed through the House of Representatives by a vote of 416 to 3. An amended form of the bill passed the Senate by unanimous consent. The House then approved the Senate version with minor changes before the bill passed both chambers with little resistance. It was signed into law by President Obama on December 9, 2010.¹¹⁷

112. *Scheele v. Dustin*, 2010 VT 45, ¶ 17, 998 A.2d 697, 704 (2010) (quoting *Lamare v. N. Country Animal Hosp.*, 170 Vt. 115, 122, 743 A.2d 598, 603 (1999)).

113. *United States v. Stevens*, 130 S. Ct. 1577, 1589 (2010) (citing Brief of Respondent-Appellee at 43–44, *United States v. Stevens*, 130 S. Ct. 1577 (No. 08-769)).

114. *See id.* at 1598 (Alito, J., dissenting) (citing Brief for Humane Society, *supra* note 11, at 5).

115. *Id.*

116. Animal Crush Video Prohibition Act of 2010, H.R. 5566, 111th Cong. § 1 (2010).

117. Bill Mears, *Obama Signs Law Banning 'Crush Videos' Depicting Animal Cruelty*, CNN.COM (Dec. 10, 2010), http://articles.cnn.com/2010-12-10/politics/animal.cruelty_1_dog-fighting-videos-crush-videos-animal-cruelty?_s=PM:POLITICS.

Unfortunately, even the newly refurbished § 48 may be constitutionally problematic. Section 2 of the Act recites the following findings:

- (1) The United States has a long history of prohibiting the interstate sale, marketing, advertising, exchange, and distribution of obscene material and speech that is integral to criminal conduct.
- (2) The Federal Government and the States have a compelling interest in preventing intentional acts of extreme animal cruelty.
- (3) Each of the several States and the District of Columbia criminalize intentional acts of extreme animal cruelty, such as the intentional crushing, burning, drowning, suffocating, or impaling of animals for no socially redeeming purpose.
- (4) There 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’.
- (5) The Supreme Court of the United States has long held that obscenity is an exception to speech protected under the First Amendment to the Constitution of the United States.
- (6) In the judgment of Congress, many animal crush videos are obscene in the sense that the depictions, taken as a whole—
 - (A) appeal to the prurient interest in sex;
 - (B) are patently offensive; and
 - (C) lack serious literary, artistic, political, or scientific value.
- (7) Serious criminal acts of extreme animal cruelty are integral to the creation, sale, distribution, advertising, marketing, and exchange of animal crush videos.
- (8) The creation, sale, distribution, advertising, marketing, and exchange of animal crush videos is intrinsically related and integral to creating an incentive for, directly causing, and perpetuating demand for the serious acts of extreme animal cruelty the videos depict. The primary reason for those criminal acts is the creation, sale, distribution, advertising, marketing, and exchange of the animal crush video image.
- (9) The serious acts of extreme animal cruelty necessary to make animal crush videos are committed in a clandestine manner that—
 - (A) allows the perpetrators of such crimes to remain anonymous;
 - (B) makes it extraordinarily difficult to establish the jurisdiction within which the underlying criminal acts of extreme animal cruelty occurred; and

(C) often precludes proof that the criminal acts occurred within the statute of limitations.

(10) Each of the difficulties described in paragraph (9) seriously frustrates and impedes the ability of State authorities to enforce the criminal statutes prohibiting such behavior.¹¹⁸

Section 3 of the Act, which amends § 48 in its entirety, sets forth the operative regulatory provisions and purports to tailor the prohibition to “animal crush videos.” That section provides in pertinent part:

(a) DEFINITION.—In this section the term ‘animal crush video’ means any 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, impaled, 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.

(b) Prohibitions.—

(1) CREATION OF ANIMAL CRUSH VIDEOS.— It shall be unlawful for any person to knowingly create an animal crush video, if—

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

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

(2) DISTRIBUTION OF ANIMAL CRUSH VIDEOS.—It shall be unlawful for any person to knowingly sell, market, advertise, exchange, or distribute an animal crush video in, or using a means or facility of, interstate or foreign commerce.

(e) EXCEPTIONS.—

(1) IN GENERAL.—This section shall not apply with regard to any visual depiction of—

(A) customary and normal veterinary or agricultural husbandry practices;

(B) the slaughter of animals for food; or

(C) hunting, trapping, or fishing.

118. *Id.* § 2.

- (2) GOOD-FAITH DISTRIBUTION.—This section shall not apply to the good-faith distribution of an animal crush video to—
- (A) a law enforcement agency; or
 - (B) a third party for the sole purpose of analysis to determine if referral to a law enforcement agency is appropriate.¹¹⁹

H.R. 5566 improves upon its predecessor in several respects. Congress wisely scrapped the “serious-value” exception clause and replaced it with a more explicit and comprehensive exemption for depictions of all hunting, trapping, fishing, veterinary, slaughterhouse, and agricultural practices. Also, subsections (7) through (10) within the fact-finding section deftly circumnavigate *Stevens* and encapsulate the doctrinal impetus of *Ferber*, thereby laying out a cogent case for government regulation. The most probative and constitutionally significant findings refer to the clandestine manner in which crush videos are created. The findings explain why the deliberate anonymity of the perpetrators, and the concealment of key facts such as the date and location of the films, have effectively insulated the perpetrators from criminal liability. These findings appear to satisfy the elements of unprotected speech under *Ferber* and the speech-integral-to-criminal-conduct cases discussed above.¹²⁰ The tenor of the Court’s opinion in *Stevens* strongly suggests that it would not challenge the empirical accuracy or validity of these findings as applied to crush videos.

Despite these promising qualities, however, the amended statute showcases some potentially fatal constitutional flaws. A cursory review of the Act reveals that Congress continues to labor under the misguided belief that crush videos are a form of “obscenity” in the constitutional sense. In fact, the statute is really a hybrid of *Ferber* and *Miller*. While crush videos may be “obscene” in the vernacular sense of the term, they do not satisfy the elements of the *Miller* test. In order for content to qualify as obscenity under *Miller*, it must appeal to the prurient interest, lack serious social value, and describe *sexual* conduct in a patently offensive way.¹²¹ Crush videos depict *violent* conduct, not sex organs or graphic sex acts. In its findings, Congress cites all elements of *Miller* except the “sexual conduct” requirement, but the Court is not likely to embrace such a selective application of *Miller*. Extending *Miller* to violent depictions that are not sexually explicit would produce an unprincipled, untenable, and unwieldy formula for segregating protected speech from unprotected speech.

119. *Id.* at § 3.

120. See *supra* Part II.

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

Nonetheless, H.R. 5566 incorporates the key elements of *Ferber* and establishes an ineluctable bond between crush videos and criminality. Given this redeeming attribute, the statute's incorporation of a modified *Miller* standard may not necessarily render it invalid. The Court could conceivably overlook the prefatory references to obscenity and address the more substantive and more compelling reasons for why Congress has an overriding interest in regulating crush videos.

The statute's most profound pitfall is contained in the definitional section. That section defines "animal crush videos" as "obscene" videos that depict "actual conduct" in which a living animal is "intentionally crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury."¹²² The term "obscene" is left undefined in the operative sections of the statute, and could be reasonably construed to reach most, if not all, depictions of animal cruelty, including dog-fighting videos. Perhaps most importantly, the statute does not define crush videos as those in which the faces or other identifying characteristics of the perpetrators are concealed. Anonymity is the defining characteristic of crush videos, yet the statute contains no such limitation. As a result, the statutory language is broad enough to encompass videos in which the faces, names, and addresses of the perpetrators are fully revealed. For these reasons, H.R. 5566 fails the "narrow tailoring" and "least-restrictive means" prongs of strict scrutiny analysis.

Much of what makes the government's interest compelling in this area is law enforcement's inability to successfully identify and prosecute crush-video actors and producers under existing animal cruelty laws *because of their anonymity*. This interest is not applicable to videos in which the perpetrators, dates, and locations of production are readily identifiable, yet the prohibition applies to these videos as well. H.R. 5566 is, therefore, overinclusive in targeting videos that do not pose the law-enforcement problem cited by Congress in the preamble. Although Congress has a compelling interest in criminalizing anonymous crush videos, H.R. 5566 is not narrowly tailored to serve that interest, nor is it the least restrictive means of doing so.

The breadth of the definitional section could render the entire prohibition unconstitutional. Because the statute criminalizes the creation and distribution of videos, including those which positively identify the perpetrators, it could chill or punish speech by animal rights activists, educators, news media, and other concerned citizens who film or distribute depictions of animal cruelty for the sole purpose of exposing the cruelty and

122. H.R. 5566, § 3(a)(1).

the perpetrators. In the absence of an “anonymity” requirement, the amended crush-video ban is vulnerable to both facial and as-applied challenges. The Court will not grant Congress the benefit of the interpretive doubt in this area, and it will not rewrite legislation that is not reasonably susceptible to a limiting construction.¹²³

Whittling down § 48 to target only those crush videos in which the identities of the perpetrators are concealed would likely satisfy the Court’s most stringent free speech doctrine. While such a limited regulation may seem like too great a concession for animal rights activists, they too should question the wisdom of a law that would criminalize depictions of animal cruelty in which the perpetrators disclose their identities. The plain language of § 48 applies not only to crush video actors, but also to those who wish to disseminate videos and photographs depicting animal cruelty for the sole purpose of exposing and punishing the cruelty.¹²⁴ The statute, in effect, could chill or punish the very kind of speech that has proven to be invaluable to the animal rights movement.

Many of the perpetrators shown in animal-cruelty videos do not mask their identities. In fact, the dogfighting videos at issue in *Stevens* showed the faces of the participants and even disclosed their names and addresses.¹²⁵ Allowing widespread distribution of such videos contributes to public discourse and a greater public awareness of issues regarding the humane treatment of animals. Unleashing this kind of speech can also be very conducive to law-enforcement interests. Just this summer, a British bank teller was caught on video casually throwing a cat into a garbage can and slamming the lid shut.¹²⁶ Thanks to the video footage distributed by the media and private citizens, Mary Bale was positively identified and now awaits prosecution.¹²⁷ This depiction of animal cruelty sparked worldwide scorn for the “cat dumper,” and she took a leave of absence from her job due to stress from the constant barrage of death threats and hate mail.¹²⁸

Another video recently posted on YouTube shows a young woman gleefully hurling an entire litter of perfectly healthy puppies into a fast-

123. *Stevens*, 130 S. Ct. at 1591–92.

124. See Adams, *supra* note 74, at 212; see also Letter from the ACLU to the House Opposing HR 5566 Prevention of Interstate Commerce in Animal Crush Videos Act of 2010 (Jul. 30, 2010), available at <http://www.aclu.org/free-speech/aclu-letter-house-opposing-hr-5566-prevention-interstate-commerce-animal-crush-videos-ac>.

125. *United States v. Stevens*, 533 F.3d 218, 234 (3d Cir. 2008) (en banc).

126. *Bank Worker Who Dumped Cat in Wheelie Bin ‘Signed Off’ Work for Weeks Suffering From Stress*, DAILY MAIL REPORTER, Sept. 1, 2010, available at <http://dailymail.co.uk/news/article-1307928/Mary-Bale-signed-work-stress-dumping-cat-wheelie-bin.html>.

127. *Id.*

128. *Id.*

moving river.¹²⁹ The woman makes no effort to conceal her face and looks directly into the camera several times.¹³⁰ The video was viewed and distributed by thousands of online animal lovers who launched a massive international campaign to catch the puppy killer.¹³¹ Film director Michael Bay was so infuriated he offered a \$50,000 reward for information leading to the arrest of the woman and the person who filmed the video.¹³² Yet under H.R. 5566, the distribution of this video would be prohibited, or at least chilled, because it is arguably “obscene” and depicts “actual conduct” in which “1 or more living non-human mammals” are “intentionally . . . drowned.”¹³³

CONCLUSION

Justice Brandeis famously wrote: “Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent,” and that “[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”¹³⁴ Congress can and should criminalize crush videos, but it must do so in an exceedingly circumspect and delimiting manner. While the amended § 48 is a leaner and meaner prohibition than its predecessor, its plain language leaves room for substantial overreaching at the cost of First Amendment freedoms.

Many images in our society are disturbing, but unpleasant depictions of violence and injustice have often spurred the moral progress of nations.¹³⁵ Depictions of animal cruelty are horrific, but they are also very useful tools in raising public awareness and in bringing criminals to justice. Banning all depictions of animal cruelty as a class would only serve to chill protected

129. See Michael Sheridan, *Shocking Online Video of Girl Throwing Live Puppies Into River Sparks Anger, Death Threats*, NYDAILYNEWS.COM (Aug. 31, 2010), http://www.nydailynews.com/news/world/2010/08/31/2010-08-31_shocking_video_of_woman_throwing_live_puppies_into_river_sparks_anger_death_thre.html.

130. *Id.*

131. *Id.*; see also *Girl Throws Puppies into River, PETA Offers Reward for Her Identity*, PETA.ORG (Aug. 10, 2010), <http://www.peta.org/b/thepetafiles/archive/2010/08/31/girl-throws-puppies-into-river-peta-offers-reward-for-her-identity.aspx>.

132. *I Saved Puppies Thrown in River by Teenage Girl: Grandmother, 75, Claims She Found Dogs Struggling in Water*, DAILY MAIL (Sept. 6, 2010), <http://dailymail.co.uk/news/worldnews/article-1309135/Puppy-throwing-girl-Grandmother-saved-dogs-struggling-water.html>.

133. H.R. 5566, 111th Cong. § 3(a)(1) 2010.

134. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

135. See Michael Reynolds, *Depictions of the Pig Roast: Restricting Violent Speech Without Burning the House*, 82 S. CAL. L. REV. 341, 365 (2009) (“Violence can provide a very valuable emphasis for a particular idea. It may be used to emphasize the horrors of war, the immorality of abortion, or the evil of killing animals for fur.”).

speech and force illegal operations to become less transparent, which would hamper efforts to expose the cruelty and prosecute the offenders. The inclusion of an anonymity requirement in § 48 would still reach most, if not all, crush videos on the market today. Those who would still choose to profit from this gruesome industry without violating a properly tailored § 48 would be forced to disclose their identities and thereby expose themselves to arrest, prosecution, and imprisonment under existing animal cruelty laws.

For those of us who cherish the First Amendment as much as our furry friends, there are constitutional *and* political reasons for snuffing out the crush-video industry while maintaining the utmost fidelity to that inexorable command: “Congress shall make no law . . . abridging the freedom of speech.”¹³⁶

136. U.S. CONST. amend. 1.