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PUNISHING DEPICTIONS OF ANIMAL CRUELTY: UNCONSTITUTIONAL OR A VALID RESTRICTION ON SPEECH?

*Kerry Adams**

INTRODUCTION

Two roosters are in a ring, pecking and clawing at each other, fighting to the death.[1] People stand around the ring and cheer for the rooster they have placed their money on. Feathers can be seen flying, the roosters are getting bloodied, and are blinding each other.[2] Every state in the United States bans cockfighting; however, it is not banned in Puerto Rico, where this particular cockfight is taking place.[3] When these legally staged cockfights are broadcast to the United States for commercial gain, the seller can be criminally prosecuted.[4]

In the first case of its kind in the country, Robert Stevens of Virginia was convicted of selling dog fighting videos.[5] The videos he sold were of dog fights that took place in Japan, where dog fighting is legal, and in the United States, before dog fighting was banned.[6] Mr. Stevens was sentenced to 37 months in prison, and has appealed his conviction.[7] The appeal is currently pending in the United States Court of Appeals for the Third Circuit. A ruling is expected soon.[8]

The law, which makes the above-described activity a crime, is being challenged in the United States District Court for the Southern District of Florida by Advanced Consulting and Marketing, Inc., a media group which broadcasts legally staged cockfights over the internet on a website entitled www.toughsportslive.com.[9] The law is being challenged on the grounds that it abridges speech protected by the First Amendment.[10] More specifically, Advanced

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1. Peter Whoriskey, *Cockfighting on Web Enters Legal Arena*, WASH. POST, July, 22, 2007, at A3, *available at* http://pqasb.pqarchiver.com/washingtonpost/search.html?nid=roll_archives (enter the article name in the search box).

2. *Id.*

3. *Id.*

4. *See* 18 U.S.C. § 48 (2008).

5. Paula Reed Ward, *Is Video of Dog Fighting Free Speech? Cruelty Conviction Appealed*, , PITT. POST-GAZETTE, Oct. 27, 2006, *available at* http://www.post-gazette.com/pg/06299/733101-85.stm.

6. *Id.*

7. *Id.*

8. Adam Liptak, *First Amendment Claim in Cockfight Suit*, N.Y. TIMES, July 11, 2007, *available at* http://www.nytimes.com/2007/07/11/us/11roosters.html. This case had been decided at time of publication, with the U.S. Court of Appeals for the Third Circuit ruling that 18 U.S.C. § 48 (2008) is an unconstitutional infringement on the First Amendment right of Free Speech. *See* United States v. Stevens, 533 F.3d 218, 220 (3d Cir. 2008).

9. Complaint at 2, Advanced Consulting and Marketing Inc. v. Gonzales, No. 1:07cv21767, 2007 WL 2049319 (S.D. Fla. July 10, 2007).

10. *Id.* at 1.

Consulting and Marketing, Inc. is challenging the law on the grounds that it is a content-based restriction on speech, overbroad, and vague.[11] Robert Stevens is also arguing in his appeal that the law is a violation of his First Amendment right of freedom of speech.[12]

In this comment, I will argue that the law making it a crime to sell depictions of animal cruelty is unconstitutional. I will argue that it violates the freedom of speech clause of the First Amendment by showing that the law is a content-based restriction on speech, overbroad, and vague. I will also argue that it does not fall into any exception to First Amendment free speech protection. Finally, I will suggest a way of writing the law so that it is no longer unconstitutional.

Part I of this comment will discuss 18 U.S.C. § 48, which punishes depictions of animal cruelty. The congressional debate on the statute will also be discussed in this section. Part II will discuss the First Amendment and exceptions to the First Amendment, which include defamation, incitement, obscenity, and pornography produced using real children. Part III will analyze the claim that the statute violates the First Amendment due to its restriction on content-based speech. Part IV will analyze the claim that the statute is overbroad. Part V will analyze the claim that the statute is vague as to what conduct is and is not prohibited. Part VI will discuss the child pornography exception to First Amendment protection, and will discuss how depictions of animal cruelty do not fall into this exception. Part VII will discuss the obscenity exception to First Amendment protection, and will discuss a possible way for the statute to be rewritten to fall into this exception.

I. 18 U.S.C. § 48

A. Punishing Depictions of Animal Cruelty

In 1999, President Clinton signed 18 U.S.C. § 48 into law.[13] The statute states that a person who sells, creates, or possesses a depiction of animal cruelty with the intent of placing it into interstate or foreign commerce for commercial gain can be imprisoned for no more than five years and/or fined.[14] There is an exception to this statute, which states it does not apply to a depiction that has serious political, educational, religious, journalistic, historical, scientific, or artistic value.[15] According to the statute, a "depiction of animal cruelty" means "any visual or auditory depiction," including any video, photograph, motion-picture film, sound recording, or electronic image in which a living animal is intentionally maimed, tortured, mutilated, killed, or wounded.[16] To be punishable, the conduct being depicted must be illegal under federal law or the law of the state in which the sale, creation, or pos-

11. *Id.* at 7-8.
12. Ward, *supra* note 5.
13. Complaint, *supra* note 9.
14. 18 U.S.C. § 48 (2008).
15. *Id.*
16. *Id.*

session took place.[17] The sale, creation, or possession can be punished even if the animal cruelty being depicted took place in a state where the act is legal.[18] The statute defines "State" as any state, the District of Columbia, the Commonwealth of Puerto Rico, and other territories, commonwealths, or possessions of the United States.[19]

B. House Debate on the Statute

On October 19, 1999, the House of Representatives debated whether to pass 18 U.S.C. § 48, which would punish depictions of animal cruelty.[20] Representative Bill McCollum of Florida was the first to speak in support of passage of the bill.[21] Mr. McCollum stated that in the subcommittee hearing on this bill, a California prosecutor and police officer described a growing industry that deals with depictions of animal cruelty.[22] The growing industry involves selling "crush" videos, in which women, either barefoot or in high heels, slowly crush small animals, including hamsters, cats, dogs and monkeys.[23] Mr. McCollum watched a "crush" video and stated a small animal was pinned down on the floor and a woman in high-heeled stilettos talked in vulgar language to the animal while slowly crushing each of its limbs.[24] The subcommittee did not view the entire video, but was informed "the animal was literally crushed into the ground over a period of 10 or 12 minutes."[25] The prosecutor and police officer informed the subcommittee that these videos are sold because they appeal to people with a specific sexual fetish who find these depictions "sexually arousing."[26] They also explained they are not able to prosecute those who make these videos because the women's faces are often not shown, and there is no way to tell where or when the videos were made.[27] As a result, authorities are not able to prosecute under existing state animal cruelty statutes.[28]

Mr. McCollum stated this bill would stop the interstate and international sale of "crush" videos.[29] He addressed concerns of those who stated the statute would punish those selling depictions of hunting and fishing, or those making and selling documentaries on bullfighting or elephant poaching.[30] Mr. McCollum stated that these types of programs would fall within the exception to the statute since they have serious religious, scientific, political, educational, journalistic, artistic, or his-

17. *Id.*
18. *Id.*
19. *Id.*
20. 145 CONG. REC. H. 10,267 (1999).
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. 145 CONG. REC. H. at 10,267.
28. *Id.*
29. *Id.*
30. *Id.*

toric value.[31] Further, in order for an image to be deemed illegal, the activity depicted must be illegal under either federal law or the state law where the creation, possession or sale took place; therefore, hunting and fishing videos would not be found illegal since neither activity is illegal under federal or state law.[32]

Mr. McCollum stated the bill would not criminalize the mere possession of these videos, but would criminalize possession with the intent to place the depiction in interstate commerce, which the government would have the burden of proving.[33] He noted that Congress has the power to pass this bill since Congress alone has the power to regulate interstate commerce.[34] Mr. McCollum also claimed it is a valid bill because it is narrowly tailored and addresses only conduct which state law cannot reach.[35]

Other Representatives also gave arguments in support of passage of this bill. Representative Elton Gallegly of California, the sponsor of the bill, stated that studies have found that people who torture or commit violent acts on animals go on to commit violent acts on people.[36] This is the case with many well known serial killers.[37] Representative Spencer Bachus from Alabama argued that when young people view videos like "crush" videos, they become desensitized to this type of violence, and it can be a "gateway" to more violent acts such as murder.[38] He stated the First Amendment does need to be protected, but so do our children.[39] Representative Sheila Jackson-Lee of Texas argued that the federal government should pass this bill to make a moral statement about what behavior is viewed as intolerable.[40]

Representative Robert Scott of Virginia was the first to speak against passage of the bill.[41] He argued Congress has the power to constitutionally prohibit cruelty to animals but cannot constitutionally prohibit communications regarding animal cruelty.[42] Mr. Scott contended depictions of animal cruelty are no different than the content of closed circuit films showing actual robberies or crimes being committed, which are shown on television shows such as Cops.[43] He maintained the Supreme Court has consistently refused to carve out exceptions to the First Amendment, and the speech prohibited by this bill does not fall into any exception to First Amendment protection.[44] Mr. Scott looked at the obscenity exception to the First Amendment and reasoned that some videos which would be prohibited by the bill are obscene, but many videos that would be covered by the bill are not ob-

31. *Id.*
32. *Id.*
33. *Id.*
34. 145 CONG. REC. H. at 10,267.
35. *Id.*
36. *Id.* at 10,269.
37. *Id.*
38. *Id.* at 10,271.
39. *Id.*
40. *Id.*
41. 145 CONG. REC. H. at 10,267.
42. *Id.* at 10,268.
43. *Id.*
44. *Id.*

scene.[45] Mr. Scott also stated the government does not have a compelling interest to criminalize depictions of animal cruelty because animal rights do not supersede fundamental human constitutional rights.[46] He argued the bill is not narrowly tailored, because to be narrowly tailored, it would need to punish those committing the actual acts of animal cruelty, not those selling videos of the animal cruelty.[47]

Other representatives argued against passage of the bill as well. Representative Bob Barr of Georgia stated all fifty states already criminalize animal cruelty, which is really what this bill is attempting to do.[48] Representative Ron Paul of Texas maintained that this bill would open "Pandora's box" because it is too broad.[49] He argued the bill is not intended to punish the sale of videos depicting hunting or fishing, but legislation often "gets carried away and is misinterpreted."[50]

The debate in the House of Representatives ended with the House passing the bill on October 19, 1999.[51] There were 372 ayes and 42 nays on the passage of this bill.[52] President Clinton signed the bill into law on December 3, 1999.[53]

II. FIRST AMENDMENT AND EXCEPTIONS TO FREEDOM OF SPEECH

The First Amendment to the Constitution states, "Congress shall make no law . . . abridging the freedom of speech . . . ."[54] Generally, the First Amendment does not allow the government to dictate what is seen, spoken, read, or heard.[55] The Supreme Court, however, has carved out some exceptions to First Amendment protection. In the case of *Ashcroft v. Free Speech Coalition*, the Supreme Court noted freedom of speech does not protect defamation, incitement, obscenity, and pornography produced using real children.[56]

III. CONTENT-BASED REGULATIONS

In the case of *Advanced Consulting and Marketing Inc. v. Gonzales*, which has been filed in the United States District Court for the Southern District of Florida, Advanced Consulting and Marketing, Inc. argues 18 U.S.C. § 48 is a content-based restriction on speech which violates their First Amendment right of freedom of speech.[57] A regulation on speech which focuses on the content of the speech and

45. *Id.*
46. *Id.*
47. *Id.*
48. 145 CONG. REC. H. at 10,269.
49. *Id.* at 10270.
50. *Id.*
51. 199 Bill Tracking H.R. 1887 (LEXIS).
52. *Id.*
53. *Id.*
54. U.S. CONST. amend. I.
55. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245 (2002).
56. *Id.* at 246.
57. Complaint, *supra* note 9.

the direct impact it has on its "listeners" is considered a content-based regulation.[58] Further, regulations on speech are considered content-based if the purpose and design of the statute is to regulate speech based solely on what is being said.[59] Statutes which are intended or designed to suppress the expressions of specific speakers are contradictory to basic First Amendment principles, and the Supreme Court has stated that "all content-based regulations restrictions on speech must give us more than a moment's pause."[60]

Courts have discussed the level of scrutiny to be applied to a statute restricting speech based on its content in numerous cases. Specifically, the government may not prohibit speech simply because society finds the speech or expression disagreeable or offensive.[61] In order for the government to legitimately enact a content-based regulation, the government must meet the strict scrutiny test, in which they must prove the statute advances a compelling governmental interest and is narrowly tailored to advance that compelling interest.[62] The purpose of the test is to ensure speech is restricted no more than necessary to achieve a compelling interest, so that legitimate speech is not chilled or punished.[63]

When applying the definition of content-based regulations to 18 U.S.C. § 48, it is apparent the statute is a content-based regulation of speech. The statute criminalizes the sale, creation, or possession of depictions of animal cruelty.[64] The restriction is based solely on the content of the speech.[65] Clearly, the statute is designed and intended to punish the content of the speech, which is animal cruelty, not the actual act of selling, creating, or possessing videos or other depictions.[66] Since the statute is a content based regulation, the government must meet the strict scrutiny test, meaning the government must prove there is a compelling governmental interest in suppressing depictions of animal cruelty, and that the regulation is narrowly tailored to advance that compelling interest.[67] The two prongs of the strict scrutiny test will be discussed in detail in the next two sections.

A. Compelling Governmental Interest

For the government to restrict content based speech, it must first prove there is a compelling governmental interest for doing so.[68] In the past, the Supreme Court has found a compelling governmental interest in areas such as "safeguarding the

58. *See* Boos v. Barry, 485 U.S. 312, 321 (1988) (The Supreme Court determined a statute was a content based regulation of speech because it prohibited persons from displaying signs, flags, placards, etc., which could be seen as critical of a foreign government, within 500 feet of embassies of foreign governments).
59. U.S. v. Playboy Entm't Group, 529 U.S. 803, 811 (2000).
60. *Id.* at 812, 826.
61. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victim's Bd., 502 U.S. 105, 118 (1991) (quoting United States v. Eichman, 496 U.S. 310, 319 (1990)).
62. Se. Booksellers Ass'n v. McMaster, 371 F. Supp. 2d 773, 781 (2005).
63. *Id.* at 778–79.
64. 18 U.S.C. § 48 (2008).
65. *Id.*
66. *See id.*
67. *See Se. Booksellers*, 371 F. Supp. 2d at 781 (describing the two prong strict scrutiny test to be used when the government has enacted a content based regulation).
68. *Id.*

physical and psychological well being of a minor" and preventing sexual abuse and exploitation of children.[69] The Court has also found a governmental interest in protecting public health and preventing cruelty to animals.[70]

The government gave many reasons for why it has a compelling interest in punishing depictions of animal cruelty. The first interest the House of Representatives maintained was compelling enough to pass the bill was to prevent cruelty to animals.[71] The Supreme Court has determined that preventing cruelty to animals is a compelling governmental interest.[72] Since preventing cruelty to animals has been established as a compelling governmental interest, it must be shown that the regulation on the speech is narrowly tailored to advance that interest.[73] In other words, it must be shown that punishing the sale, creation, and possession of depictions of animal cruelty is narrowly tailored to advance the government's interest in preventing cruelty to animals.

The House of Representatives also gave other possible governmental interests, neither of which is compelling. Representative Bachus of Alabama argued the government has an interest in preventing young people from viewing depictions of animal cruelty because it could be a gateway to crimes such as murder.[74] Representative Constance Morella of Maryland maintained the government has an interest in preventing violence against humans, as well as decreasing domestic violence.[75] The author of the bill stated many serial killers killed animals before killing people, and many studies show that those who commit violent acts against animals later commit violent acts on people.[76] Though these are legitimate governmental interests, they are not considered compelling interests which would justify suppressing protected speech.[77] The Supreme Court has stated that speech may not be prohibited simply because it deals with a subject that offends the public's sensibilities, or because it could possibly lead to future crime.[78] Because the Supreme Court has clearly established that this reasoning falls short of the criteria necessary to establish a compelling governmental interest, the government must base the first prong of its argument solely on the prevention of cruelty to animals.

69. New York v. Ferber, 458 U.S. 747, 757 (1982) (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)).

70. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 538 (1993).

71. *See* Con. Rec. H. 10267 (several members of the House of Representatives discuss their reasoning for supporting the bill, as well as the interest the government has in passing the bill).

72. *See Lukumi Babalu Aye*, 508 U.S. at 538.

73. *See Se. Booksellers*, 371 F. Supp. 2d at 781 (stating when a statute is a content based regulation, it must be struck down unless it is narrowly tailored to advance the compelling governmental interest).

74. CONG. REC. H. at 10,271.

75. *Id.* (Ms. Morella claims abusers threaten to harm animals to show they have control of their home, and that there is growing concern that violence perpetrated on animals often escalates into violence against humans).

76. *Id.* at 10,269.

77. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245 (2002) (stating the prospect of crime alone does not justify laws suppressing speech which is protected).

78. *Id.*

B. Narrowly Tailored

For a content based regulation on speech to be valid, it must be narrowly tailored to advance a compelling governmental interest.[79] A statute is considered narrowly tailored if "(1) it employs the least restrictive means to achieve its goal and (2) there is a nexus between the government's compelling interest and the restriction."[80] Therefore, it must be determined if 18 U.S.C § 48 is narrowly tailored to advance the interest of preventing cruelty to animals.

In the U.S. Supreme Court case of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court determined the constitutionality of a statute that prohibited the practice of animal sacrifice.[81] The statute contained an exception for licensed establishments that killed animals "specifically raised for food purposes."[82] The constitutionality of the statute was challenged by members of the Church of the Lukumi Babalu Aye, who practiced the Santeria religion, which used animal sacrifice in their rituals.[83] Although the Court 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.[84] The Court found that although the city of Hialeah had an interest in the adequate care of its animals, it could regulate the conditions and treatment of the animals rather than criminalize the possession and sacrifice of the animals.[85] In other words, the city had other ways to protect the animals that did not criminalize their ritual sacrifice, which resulted in a violation of the Church's First Amendment right of freedom of religion.[86]

When applying the *Church of the Lukumi Babalu Aye* reasoning to 18 U.S.C. § 48, it is evident the statute is not narrowly tailored to advance the interest of preventing cruelty to animals.[87] In the House of Representatives debate on the bill, Representative Scott of Virginia argued that the bill intends to prevent animal cruelty by stopping the creation and distribution of films depicting animal cruelty when used for commercial purposes.[88] Further, he stated the bill could be narrowly tailored by actually prosecuting those who are engaged in activities considered to be cruel to animals.[89] Representative Barr of Georgia noted that all fifty states already have laws to prevent cruelty to animals.[90] This means that, as in the *Church of the Lukumi Babalu Aye* case, there are other ways to advance the compelling

79. *Se. Booksellers*, 371 F. Supp. 2d at 781.
80. *Id.*
81. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 527-28 (1993).
82. *Id.*
83. *Id.* at 525.
84. *Id.* at 538.
85. *Id.* at 539.
86. *See id.*
87. *See* 145 CONG. REC. H. at 10,267 (in which several members of the House of Representatives discuss their reasoning for supporting the bill, as well as the interest the government has in passing the bill).
88. *Id.* at 10,268.
89. *Id.*
90. *Id.* at 10,269.

governmental interest that do not violate a person's First Amendment rights.[91] Since all fifty states have laws preventing cruelty to animals, this law punishing the creation, possession, and sale of depictions of animal cruelty is not the least restrictive means possible to advance that interest. A statute which suppresses constitutionally protected speech is unacceptable if there are less restrictive alternatives that could be at least as effective in achieving the legitimate interest of the state advanced by the statute.[92] As Representative Paul of Texas stated, this bill is not needed because it should be adequate that all fifty states already have laws against cruelty and violence to animals.[93]

Several Representatives argued that the bill is narrowly tailored, and would therefore pass the strict scrutiny test.[94] Representative Sam Farr of California, who argued in support of the bill, maintained the bill was narrowly tailored because it does not preempt any state laws against animal cruelty, but incorporates the animal cruelty law of the state in which the offense occurs.[95] Representative Jackson-Lee of Texas was concerned about the bill violating the First Amendment, but decided it does address a compelling state interest and is narrowly tailored to the creation, possession, and sale of a known depiction of animal cruelty, which is illegal in the state in which the creation, possession, and sale took place.[96] These arguments do not seem to show that the bill is narrowly tailored. The compelling interest is to prevent cruelty to animals, and the way to do that by the least restrictive means is to criminalize the actual act of cruelty inflicted upon the animal. Punishing the person who may not have been involved in the actual cruel act, but sold a video of the cruel act, is not narrowly tailored to pass the strict scrutiny test. Therefore, 18 U.S.C. § 48 is a content based regulation on speech which does not pass the strict scrutiny test.

IV. OVERBROAD

In the case of *Advanced Consulting and Marketing Inc. v. Gonzales*, Advanced Consulting and Marketing, Inc. also claims 18 U.S.C. § 48 is a violation of the First Amendment because it is overbroad and chills their freedom of speech.[97] A statute is considered overbroad if it punishes a "substantial amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'"[98] If a statute is found to be overbroad, all enforcement of that law is invalidated.[99] The statute will be invalidated unless and until the part of the statute deemed invalidated is

91. *Lukumi Babalu Aye*, 508 U.S. at 539.
92. Se. Booksellers Ass'n v. McMaster, 371 F. Supp. 2d 773, 778 (2005).
93. CONG. REC..H. at 10,270.
94. *See id.* (several Representatives in support of the bill argue it is narrowly tailored to advance a compelling governmental interest).
95. *Id.* at 10,273.
96. *Id.* at 10,272.
97. Complaint, *supra* note 9, at 6.
98. Virginia v. Hicks, 539 U.S. 113, 118–19 (2003) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)).
99. *Id.* at 119.

narrowed to remove the threat to protected speech.[100] Overbreadth has been created as a remedy in response to a concern that the enforcement of an overbroad statute may "deter or chill constitutionally protected speech," especially when the state imposes criminal sanctions on violations of the statute.[101] A statute is considered to chill speech if the regulation punishes speech in a way that a person is more likely to simply abstain from expressing the protected speech rather than go through the burden of "vindicating their rights through case by case litigation."[102] This would cause harm not only to the person abstaining from expressing their protected speech, but to society as a whole by depriving "an uninhibited marketplace of ideas."[103] In order for a statute to be deemed invalid as overbroad, the application of the statute to protected speech must be "substantial."[104] In determining if a statute is overbroad, the court must look at the law as a whole judged in relation to its "legitimate sweep."[105]

Statutes can be facially challenged for being overbroad in two different ways.[106] The first way in which a statute can be facially challenged for being overbroad is if the statute "could never be applied in a valid manner."[107] The second way to facially challenge a statute for being overbroad is if the statute "may inhibit the constitutionally protected speech of third parties."[108] This facial challenge can only succeed if the statute is "substantially overbroad."[109] This means that if a court can find there is a "realistic danger" the statute will significantly compromise the recognized First Amendment protections of persons not before the court, it will be found on its face to be overbroad.[110]

On his website The Volokh Conspiracy, Eugene Volokh[111] discusses 18 U.S.C. § 48 and the possible protected speech it could punish.[112] He maintains that as the statute is currently written, it would punish not only "crush" videos, but would also punish the following: a television program showing foreign bullfights shot in a country where they are legal but sold in a state in which they are illegal, a magazine with photographs of people killing endangered animals illegally in a foreign country, and a magazine with photographs of people committing acts of cruelty to animals that are shown with the intent to expose and punish the cruelty.[113] This

100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 119–20.
105. *Id.* at 122.
106. N.Y. State Club Ass'n v. City of N.Y., 487 U.S. 1, 11 (1988).
107. *Id.* (quoting City Council of Los Angeles v. Taxpayers for Vincent 466 U.S. 789, 798 (1984)).
108. *Id.*
109. *Id.*
110. *Id.*
111. Eugene Volokh is the Gary T. Schwartz Professor of Law at UCLA. He teaches Religion Clauses law, free speech law, academic legal writing, and criminal law. Prior to becoming a law professor, he clerked for 9th Cir. Judge Alex Kozinski and Justice Sandra Day O'Connor. Information obtained from EUGENE VOLOKH, ACADEMIC LEGAL WRITING: LAW REVIEW ARTICLES, STUDENT NOTES, SEMINAR PAPERS, AND GETTING ON LAW REVIEW, (Foundation Press 2007).
112. Eugene Volokh, The Volokh Conspiracy, *The First Amendment and Cockfight Videos*, July 11, 2007, http://volokh.com/posts/1184174039.shtml (last visited Dec. 28, 2007).
113. *Id.*

would mean the statute is overbroad because it has the potential to punish speech protected by the First Amendment, which was not originally intended to be punished by the statute.[114] The intent of the statute is to enable the police and prosecutors to punish those who sell "crush" videos, but it is possible forms of speech other than "crush" videos (such as those listed above) could be chilled or punished as well.

During the House of Representatives debate on 18 U.S.C. § 48, Representative McCollum claimed the bill is not overbroad because there is an exception to the bill's prohibition if the material in question has serious political, scientific, religious, journalistic, educational, artistic, or historic value.[115] He argues this would ensure a program about Spain showing bull fighting or a documentary on elephant poaching would not violate the statute.[116] He also argues the sale of depictions of legal activities, such as fishing and hunting, would also not violate the statute.[117] This would be true if courts interpreted the statute in the way the House of Representatives intends the courts to interpret the statute, but as Representative Paul noted, Congress' legislation is often misinterpreted by the courts.[118] Eugene Volokh also makes the argument that while the statute exempts some material with serious value, the test as to what "serious religious, political, scientific, educational, journalistic, historical, or artistic value" incorporates is a subjective test, and some jurors or judges may feel that a video depicting bull fighting has no serious value.[119] He also notes the "serious value" exception is a small safe harbor.[120]

Due to the substantial amount of speech other than "crush" videos that could be punished under 18 U.S.C. § 48, the scope of the statute is overbroad. Even though there are exceptions to the statute, the exceptions could be interpreted in different ways by different judges and juries. A depiction that is intended to fall into an exception could be interpreted as violating the statute by a judge in one area of the country, while a judge in another area of the country may feel it does not violate the statute because it falls into an exception. The statute could punish speech that was intended to be protected because of the way in which the statute is interpreted by the courts. Therefore, the statute is a violation of the First Amendment due to being overbroad and chilling protected speech.

V. VAGUE

Moreover, Advanced Consulting and Marketing, Inc. also claims in its lawsuit that 18 U.S.C. § 48 is unconstitutional because it is vague as to the conduct that is prohibited.[121] A vague statute is unconstitutional because it violates the due

114. Virginia v. Hicks, 539 U.S. 113, 118 (2003) (stating a statute is considered overbroad if it punishes a "substantial amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'").
115. 145 CONG. REC. H10,267 (1999).
116. *Id.*
117. *Id.*
118. *Id.* at 10,270.
119. Volokh, *supra* note 113.
120. *Id.*
121. Complaint, *supra* note 9.

process clause of the Constitution.[122] Additionally, a statute is considered vague if it does not give persons of "reasonable intelligence" adequate notice that certain conduct is punishable by the law, or if it does not provide "sufficient standards" by which innocence or guilt can be determined.[123]

Statutes are presumed to be valid, and their constitutionality should be upheld whenever possible.[124] However, an accused has a constitutional guarantee to be informed of the nature and cause of the accusation against him or her.[125] This requires statutes to describe unlawful conduct with "sufficient particularity and clarity such that ordinary persons of reasonable intelligence are capable of discerning its meaning and confirming their conduct thereto."[126] In other words, the "void for vagueness" doctrine requires the statute to define the criminal offense with enough definiteness so that an ordinary person can understand what conduct is prohibited, and define the offense in a manner that does not promote discriminatory or arbitrary enforcement.[127] The proponent of a "void for vagueness" argument must show that the law is impermissibly vague in all of its possible applications.[128] When a court makes a determination on vagueness, the court does so on an as-applied, case by case basis.[129]

Eugene Volokh notes the possibility of the vagueness of 18 U.S.C. § 48.[130] He noted how the exception for "serious religious, political, scientific, educational, journalistic, historical, or artistic value" could be interpreted in different ways by different judges and juries.[131] In the House of Representatives debate on the bill, Representative Gallegly, the author of the bill, stated the bill would not prohibit groups like the Humane Society from creating educational videos on animal cruelty because that would fall into an exception.[132] A video such as one described by Mr. Gallegly should fall into an exception to the statute; however, there is nothing in the statute to guide courts on how to interpret the exceptions. 18 U.S.C. § 48 gives definitions to clarify what is meant by "depiction of animal cruelty" and "State," but does not give any definition to clarify what the terms covered by the exception mean.[133] This would lead an ordinary person to wonder if the video they are selling falls into an exception or not, which could lead the person to suppress their constitutionally protected speech.[134] The lack of a definition clarifying any of the exceptions could also lead to arbitrary and possible discriminatory enforcement of the

122. Louisiana v. Sandifer, 679 So. 2d 1324, 1331 (La. 1996).
123. *Id.*
124. Louisiana v. Hart, 687 So. 2d 94, 95 (La. 1997).
125. *Id.*
126. *Id.*
127. United States v. Amer, 110 F.3d 873, 878 (2d Cir. 1997).
128. *Id.*
129. United States v. Overstreet, 106 F.3d 1354, 1358 (7th Cir. 1997).
130. Volokh, *supra* note 112.
131. *Id.*
132. 145 CONG. REC. H. at 10,270.
133. 18 U.S.C. § 48 (2008).
134. United States v. Amer, 110 F.3d 873, 878 (2d Cir. 1997) (stating the "void for vagueness" doctrine requires the statute to define the criminal offense with enough definiteness so that an ordinary person can understand what conduct is prohibited).

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statute by the courts since the courts could have a wide latitude in how they interpret the exceptions to the statute.[135]

It appears that 18 U.S.C. § 48 is void due to being vague. Reading the statute, one would not be able to determine exactly what conduct is prohibited by the statute, and what conduct is allowed as an exception to the statute. This is due to the fact that there is no clear definition of what the exceptions to the statute mean, even though those exceptions would be necessary to guide a person in determining if he or she is violating the statute or not. The courts are also able to interpret the statute in an arbitrary or discriminatory manner, since they do not have clear guidance on how to interpret the statutory exceptions. As a result, 18 U.S.C. § 48 is "void for vagueness."

VI. CHILD PORNOGRAPHY EXCEPTION AND ITS RELATION TO 18 U.S.C. § 48

Child Pornography is a well established exception to First Amendment freedom of speech protection.[136] There are many correlations between child pornography laws and 18 U.S.C. § 48.[137] If the statute falls into the child pornography exception to the First Amendment, the statute will be upheld as a valid restriction on speech.

Eugene Volokh discusses whether the child pornography exception should be extended to cover 18 U.S.C. § 48.[138] First, he notes that cases of child pornography and depictions of animal cruelty both allow for restrictions on the distribution of speech because of how the speech was created.[139] Second, he argues that the statute should fall under the child pornography exception because the production of animal cruelty videos, like the production of child pornography videos, can be created in private, but have generally public distributions.[140] Third, he notes that a ban on the actual production of cruelty videos would be very hard to enforce, much like the production of child pornography videos.[141] Fourth, he maintains that as long as money can be made from distributing the cruelty videos, there will be someone willing to produce the videos, as is the case with child pornography.[142] Finally, he argues that distribution needs to be stopped in order to prevent the harm that occurs when the videos are made.[143]

Professor Volokh also makes arguments against extending the child pornography exception to 18 U.S.C. § 48.[144] He argues that the statute may suppress a lot of valuable speech, including bullfighting videos, since the exceptions are too va-

135. *Id.* (stating the "void for vagueness" doctrine requires the statute to define the criminal offense in a manner that does not promote discriminatory or arbitrary enforcement).
136. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 246 (2002) (stating freedom of speech does not embrace pornography produced with real children).
137. *See* Volokh, *supra* note 112.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. Volokh, *supra* note 112.

gue.[145] He notes the statute punishing depictions of animal cruelty will suppress more valuable speech than the child pornography law, because depictions of animal cruelty are more likely to be legitimate art or relevant to political debates than depictions of sex or lewd pictures involving children.[146] Finally, he argues the harm the distribution of depictions of animal cruelty causes (indirectly furthering animal cruelty) is much less severe than the harm child pornography causes (indirectly furthering the exploitation of children).[147] He notes the legal system itself sees the exploitation of children as much more severe than animal cruelty.[148] Sexual abuse of children is punished far more severely than animal cruelty, and cockfighting is not even a crime in Puerto Rico, though Congress could have made it a crime there.[149]

To have a full understanding of whether 18 U.S.C. § 48 should fall under the child pornography exception to First Amendment protection, there needs to be more discussion of why the courts allow an exception to the First Amendment speech protection for child pornography. *New York v. Ferber* was a major child pornography case heard by the United States Supreme Court.[150] The statute at issue in that case stated "A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age."[151] To promote means "to procure, manufacture, issue, sell give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same."[152] The issue in *New York v. Ferber* was whether, to prevent the abuse of children who are made to engage in sexual conduct for commercial purposes, the legislature could prohibit dissemination of material showing children engaging in sexual conduct without violating the First Amendment, regardless of whether or not the material produced is obscene.[153] This issue is very similar to the issue regarding 18 U.S.C. § 48, which is whether the legislature can prohibit dissemination of material showing cruelty to animals to prevent the abuse of animals without violating the First Amendment. In the case of child pornography, the Supreme Court found that the legislature could prohibit the dissemination of material showing children engaging in sexual conduct without violating the First Amendment in order to prevent child abuse.[154]

The Supreme Court gave many reasons for allowing greater leeway for statutes violating the First Amendment's protection of speech when dealing with the dis-

145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. New York v. Ferber, 458 U.S. 747 (1982).
151. *Id.* at 751.
152. *Id.*
153. *Id.* at 753.
154. *Id.* at 753, 774.

semination of child pornography.[155] First, the state has a compelling interest in "safeguarding the physical and psychological well-being of a minor."[156] The Court has sustained legislation over time aimed at protecting the emotional and physical well being of children, even if the laws have the potential to violate a constitutionally protected right.[157] Using children as subjects of pornography is so harmful to the mental, emotional, and physiological health of the child that the Court feels a statute prohibiting child pornography "passes muster under the First Amendment."[158]

The above reason could not apply to the prohibition against the distribution of depictions of animal cruelty. This is because the Supreme Court has found in the past that the government does have a legitimate interest in preventing cruelty to animals, but this interest could be advanced through means other than by violating a constitutional right.[159] Also, as Professor Volokh noted, the justice system sees the exploitation and abuse of children as much more severe than cruelty to animals, so abuse of children will be punished much more severely than cruelty to animals.[160]

The second reason the Supreme Court gives for allowing greater leeway for child pornography statutes that violate the First Amendment's freedom of speech is that the distribution of child pornography is related to the sexual abuse of children.[161] Child pornography is related to the sexual abuse of children in that the material produced is a permanent record of the child's participation in the pornography, and the child is further harmed by circulation of the material.[162] The network in which child pornography is distributed must be closed if there is to be control over the production of child pornography.[163] The production of child pornography is secret; however, there is a need to market it publicly to sell it.[164] The only practical way for law enforcement to "dry up the market" is to have severe punishments for those who sell, advertise, or promote child pornography.[165]

The reasoning behind banning child pornography has many similarities to the reasoning given by Congress when it passed 18 U.S.C. § 48. First, the fact that a child is further harmed by the circulation of the material is not applicable to videos showing cruelty to animals. This is because animals cannot be re-victimized by the distribution of videos showing cruel acts that were done to them in the past in the way that children can. However, much of the production of animal cruelty videos, like the production of child pornography, is done in private.[166] The distribution of

155. *See id.* at 756.
156. *Id.* at 756–57.
157. *Id.* at 757.
158. *Id.* at 758.
159. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 538 (1993).
160. Volokh, *supra* note 112.
161. *Ferber*, 458 U.S. at 759.
162. *Id.*
163. *Id.*
164. *Id.* at 760.
165. *Id.*
166. Volokh, *supra* note 112.

the videos must be public.[167] As Representative McCollum noted, the faces of the women on the "crush" videos cannot be seen, so often times there is no way to prosecute the person inflicting the cruelty on the animal.[168] While this is true of "crush" videos, as has already been shown, the statute would punish other depictions of cruelty to animals in which the actual act of cruelty could be punished by existing laws instead of by way of punishing the distribution or sale of the depiction.

The third reason given by the Supreme Court for allowing greater leeway for child pornography statutes to violate the First Amendment is that the advertising and sale of child pornography provides an economic motive for, and is an integral part of, the production of child pornography materials.[169] The Court states the production of child pornography is illegal throughout the nation, and the constitutional freedom of speech does not extend to speech used as an integral part of an act in violation of a valid statute.[170] The Court did note that if the statutes outlawing employment of children in the films and photographs were effective, it would leave no child pornography to be marketed.[171] In essence, since the laws against the employment of children in child pornography are not effective, the laws against the distribution, sale, and advertising of child pornography are allowed.[172]

In the case of the distribution of depictions of animal cruelty, there are laws in existence in every state against acts of animal cruelty.[173] The distribution of videos depicting animal cruelty is not an integral part of most forms of animal cruelty. It is true that the distribution of "crush" videos is an integral part of that particular form of animal cruelty, but that is not the case for most forms of animal cruelty which may fall under this statute.[174] If it were just "crush" videos covered under this statute, the child pornography exception would apply. Since other forms of depictions of animal cruelty are included, many of which existing animal cruelty statutes enable authorities to prosecute, the overall statute does not fall into this reason for the child pornography exception.

The fourth reason given by the Supreme Court for the child pornography exception is that the value of permitting depictions of children engaged in lewd sexual conduct is modest, "if not *de minimis*."[175] The court found that the visual depictions of children performing sexual acts are not an important or necessary part

167. *Id.*
168. 145 CONG. REC. H. at 10267.
169. *Ferber*, 458 U.S. at 761.
170. *Id.* at 761-62.
171. *Id.* at 762.
172. *Id.* (stating if the statutes outlawing employment of children in the films and photographs were effective, it would leave no child pornography to be marketed).
173. 145 CONG. REC. H. at 10,269 (Representative Barr of Georgia noted every one of the fifty states already have laws addressing animal cruelty).
174. *Id.* at H10,267 (Representative McCollum of Florida noted that state authorities have been prevented from using state animal cruelty laws to prosecute the makers of "crush" videos because "the faces of the women inflicting the torture in the videos are often not depicted" and there is no way to know exactly when the depictions were or where the depictions were made).
175. *Ferber*, 458 U.S. at 762.

of scientific or educational work, or a literary performance.[176] The Court maintained that if a depiction of children engaged in lewd sexual conduct was necessary for artistic or literary value, a person over the statutory age who looked young could be utilized.[177]

As Representative McCollum noted, there is no redeeming value in "crush" videos.[178] Whereas there is no doubt of the *de minimis* value of "crush" videos, it has been shown that these videos are not the only depictions of animal cruelty that are being punished or have the potential to be punished. It has been shown that the statute is overbroad and vague, especially as to its exceptions. This could make it so that depictions of animal cruelty, such as an educational documentary about the dangers of cockfighting or dog fighting, could be punished as well. These types of videos would have redeeming value in that they are bringing animal cruelty to the forefront and are raising public awareness. Once again, this reason for the child pornography exception would apply to the statute if only "crush" videos were covered by the statute, but this is not the case.

The child pornography exception to First Amendment free speech protection is allowed for many reasons. Many of these reasons would allow for the exception to apply to the statute at hand if the statute were more narrowly tailored to apply only to "crush" videos. Since the statute has been shown to be overbroad and vague and would incorporate more than just "crush" videos, the child pornography exception does not apply.

VII. OBSCENITY EXCEPTION AND ITS RELATION TO 18 U.S.C. § 48

Obscenity is another well established exception to First Amendment freedom of speech protection.[179] Obscene is defined as "disgusting to the senses" and "abhorrent to morality or virtue."[180] There are correlations to be made between obscenity and the speech sought to be restricted by 18 U.S.C. § 48.[181] If the statute falls into the obscenity exception to First Amendment freedom of speech protection, the statute will be a valid restriction on speech.

The leading case on the obscenity exception is *Miller v. California*, in which the defendant used a mass mailing campaign to advertise "adult" books.[182] He was prosecuted after sending five unsolicited brochures through the mail to a restaurant.[183] The defendant was convicted under California's criminal obscenity statute

176. *Id.* at 762-63.
177. *Id.* at 763.
178. 145 CONG. REC. H. at 10,267.
179. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245-46 (2002) (stating freedom of speech does not embrace obscenity).
180. Merriam-Webster Online, http://m-w.com/dictionary (last visited Jan. 3, 2008).
181. *See* Volokh, *supra* note 112. (stating the statute does not fit in the existing obscenity exceptions, but the statement President Clinton made while signing the bill, limiting it to "wanton cruelty to animals designed to appeal to a prurient interest in sex" brings it closer to falling into the obscenity exception, but not entirely into the obscenity exception).
182. Miller v. California, 413 U.S. 15, 16 (1973).
183. *Id.* at 17-18.

for knowingly distributing obscene material.[184] The Supreme Court noted the First Amendment has never been treated as an absolute, and it has been settled by the Supreme Court that obscene material is not protected by the First Amendment.[185] The Court maintained that for a statute to validly regulate obscene material, it must be "carefully limited."[186] The Supreme Court put forth a set of guidelines for a trier of fact to use when determining if restricted speech is considered obscene.[187] The first guideline is "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest."[188] Prurient is defined as arousing an unwholesome desire or interest, or appealing to or arousing a sexual desire.[189] When the trier of fact is determining if the work appeals to a prurient interest, it is based on that particular community's standards, not on a national standard.[190] The second guideline is whether the work describes or depicts, in a "patently offensive way," sexual conduct defined specifically by the applicable statute.[191] The third and final guideline is whether the work, taken as a whole, lacks serious artistic, scientific, political, or literary value.[192]

In the law review article entitled *Serial Killer Trading Cards and First Amendment Values: A Defense of Content Based Regulation of Violent Expression*, Jendi Reiter discusses the way the obscenity exception can be used to allow restrictions on speech that are not sexually explicit.[193] Ms. Reiter notes that serial killer trading cards are a new form of dangerous speech that promotes violence as "amoral entertainment."[194] She maintains that speech depicting violent acts has not been an exception to First Amendment protection as obscene speech has.[195] Further, Ms. Reiter states that the Miller obscenity test would be a good starting point to regulate "low value violent expression."[196] The Supreme Court is not prevented from creating a new category of speech excepted from First Amendment protection.[197] The Miller test could be used to create the new category of excepted speech because the Miller test forces a regulation to be specific and narrow.[198] The Miller test also has safe guards which ensure the fairness and accuracy of the process by which the speech is determined to be obscene by the courts.[199] She noted that the Eighth Circuit invalidated a ban on the rental or sale of videos to

184. *Id.* at 16.
185. *Id.* at 23.
186. *Id.* at 23-24.
187. *Id.* at 24.
188. *Id.*
189. Merriam-Webster Online, *supra* note 180.
190. *Miller*, 413 U.S. at 32.
191. *Id.* at 24.
192. *Id.*
193. *See* Jendi Reiter, *Serial Killer Trading Cards and First Amendment Values: A Defense of Content Based Regulation of Violent Expression*, 62 ALB. L. REV. 183 (1998).
194. *Id.* at 183.
195. *Id.* at 186-87.
196. *Id.* at 208.
197. *Id.* at 209.
198. *Id.*
199. *Id.*

minors which appealed to "morbid interests in violence."[200] The court did state a ban limited to "slasher" films which graphically portrayed rape, bestiality, murder, or other "perversions" would be "less burdensome on protected expression."[201]

Professor Volokh states there is an important difference between the third prong of the Miller obscenity test and clause (b) of 18 U.S.C. § 48, which states that the statute does not apply to depictions which have serious political, educational, scientific, religious, historical, artistic, or journalistic value.[202] He maintains that clause (b) does not say the work is to be judged "taken as a whole," which makes the exception a "smaller safe harbor" than the exception under the Miller obscenity test.[203] He notes that in President Clinton's signing statement, he stated that the Justice Department should construe the law narrowly, which would mean limiting it to "wanton cruelty to animals designed to appeal to a prurient interest in sex," which brings it closer to the obscenity exception, but not completely within the obscenity exception.[204]

Looking at the obscenity exception, as well as the article by Jendi Reiter, it appears 18 U.S.C. § 48 could be rewritten to fall into the obscenity exception to freedom of speech protection. The main intent of the statute is to prevent the production and distribution of "crush" videos.[205] If the statute could be written in a way that is narrowly tailored to show that intent, it could fall into the obscenity exception, and would be a valid restriction on speech. Specifically, the "crush" videos are intended to appeal to people with specific sexual fetishes who find these depictions "sexually arousing."[206] This shows the "crush" videos appeal to a prurient interest when taken as a whole, which satisfies the first prong of the Miller test.[207] An average person in any community across the United States, applying contemporary community standards, would find that "crush" videos appeal to a prurient interest.[208]

"Crush" videos, however, do not fully fall into the second part of the Miller obscenity test, which states speech is obscene if the work describes or depicts sexual conduct in a patently offensive way, which is specifically defined by the applicable statute.[209] While "crush" videos do not depict sexual conduct, they do depict an activity which appeals to a specific sexual fetish.[210] Jendi Reiter did note in her article that the Eighth Circuit was willing to allow a limited ban on "slasher" films which graphically portrayed rape, bestiality, murder, or other "perversions."[211]

200. *Id.* at 210 (citing Video Software Dealers Ass'n v. Webster, 968 F.2d 684, 687 (8th Cir. 1992)).
201. *Id.* (citing *Video Software Dealers Ass'n*, 968 F.2d at 689).
202. Volokh, *supra* note 112.
203. *Id.*
204. *Id.*
205. 145 CONG. REC. H. at 10,267.
206. *Id.*
207. Miller v. California, 413 U.S. 15, 24 (1973) (stating the first guideline to the obscenity test is whether the "average person" applying "contemporary community standards" would find the work, taken as a whole, appeals to a prurient interest).
208. *Id.*
209. *Id.*
210. 145 CONG. REC. H. at 10,267.
211. Reiter, *supra* note 193, at 210 (citing *Video Software Dealers Ass'n*, 968 F.2d at 687).

This would allow an exception for "crush" videos because descriptions of "crush" videos show that they are graphically portraying the torture and death of small animals, including dogs, cats, and monkeys.[212] It does this in a patently offensive way, therefore, if the statute specifically defines the patently offensive conduct, it could pass muster under the second part of the Miller test.[213]

"Crush" videos fall into the third part of the Miller test, which requires the obscene material, when taken as a whole, to lack serious political, artistic, literary, or scientific value.[214] These "crush" videos have no redeeming social or other value because they show small animals being crushed to death by women, while the women speak to them in vulgar language.[215] The purpose of selling these videos is simply to supply an industry that has sprung up to appeal to this unusual sexual fetish.[216] If the bill is narrowly tailored to "crush" videos, it will pass this part of the Miller test because "crush" videos do not have any serious political, artistic, literary, or scientific value. As Professor Volokh notes, since the exception in the current statute does not say the work has to be "taken as a whole," it does not fall into the obscenity exception.[217] If a new bill uses the term "taken as a whole" when it makes an exception for serious value, it would pass this part of the Miller test, and would be a valid restriction on speech.[218]

Putting the parts of the Miller obscenity test together, it appears a bill that criminalizes the knowing creation, sale, or possession of a "crush" video with the intention of placing it into foreign or interstate commerce for commercial gain would validly restrict this form of speech.[219] The statute could keep the words "depictions of animal cruelty" if there is a clear definition stating that the phrase "depictions of animal cruelty" is limited to "crush" videos.[220] There would need to be a definition for "crush" videos which would include all types of "crush" videos that are put into circulation. It is clear that an average person applying contemporary community standards would see that this appeals to a prurient interest, that the work depicts the death of an animal in a "patently offensive" way, and that it lacks serious political, scientific, literary, or artistic value when taken as a whole.[221] This would ensure the statute is written in a way to advance the congressional intent.[222] Since "crush" videos are almost impossible for authorities to prosecute, but other forms of animal cruelty are not, this would ensure that the statute is narrowly tailored to include only "crush" videos. This would make certain the statute was not vague or overbroad. To completely fit into the Miller test, there would have to be

212. 145 CONG. REC. H. at 10,267.
213. *Miller*, 413 U.S. at 24.
214. *Id.*
215. 145 CONG. REC. H. at 10,267.
216. *Id.*
217. Volokh, *supra* note 112.
218. *Miller*, 413 U.S. at 24.
219. 18 U.S.C. § 48 (taking the original statute and changing it from depiction of animal cruelty to "crush" videos).
220. *Id.*
221. *Miller*, 413 U.S. at 24 (applying the Miller obscenity test to "crush" videos).
222. *See* 145 CONG. REC. H. at 10,267 (in which the members of Congress supporting the bill discuss "crush" videos and the need to have a way to prosecute those responsible for "crush" videos).

an exception, stating "when taken as a whole," the depiction lacks serious literary, political, scientific, or artistic value.[223]

VIII. CONCLUSION

There is no question that animal cruelty is not acceptable in the United States and that people should be punished when they commit acts of animal cruelty. This does not necessarily mean people should be punished for creating, selling, or possessing depictions of animal cruelty when there are other laws which can be used to prosecute the person that actually committed the cruel act on the animal. The First Amendment protects speech, even if the speech being protected is disagreeable or offensive to society as a whole.[224]

Through 18 U.S.C. § 48, the government has criminalized the creation, sale, and possession of depictions of animal cruelty, when the person has an intent to place the depiction into foreign or interstate commerce.[225] The main intent of the statute is to punish the sale of "crush" videos, in which a small animal is tied down and a woman crushes the animal slowly with her bare feet or in stiletto high heels while speaking vulgar to the animal.[226] The way the statute is written, however, makes the statute unconstitutional. It has been shown the statute is an invalid restriction on content based speech, is overbroad, and vague. It has also been shown that the statute does not fall within the child pornography exception to freedom of speech protection. As written, the statute does not fall within the obscenity exception to freedom of speech either.

Just because the statute appears to be unconstitutional as written does not mean all is lost. The statute can be rewritten so that the intent of the statute is advanced without violating the First Amendment. The statute must be narrowly written to fall within the obscenity exception to freedom of speech protection. To do this, the intent of punishing those involved in the "crush" video industry must be made apparent in the statute.[227] The statute must only apply to "crush" videos and the exceptions must state the work is to be "taken as a whole."[228]

The "crush" video industry is very disturbing and repulsive. It is important that those who create and sell these videos are punished severely for torturing the animals to death. Under existing animal cruelty laws, it is almost impossible to punish those who are actually torturing the animals.[229] Since it is likely the statute will be found unconstitutional, Congress should work on writing a new bill that is narrowly tailored to punishing only those depictions of animal cruelty that are con-

223. *Miller*, 413 U.S. at 24 (applying the third part of the Miller obscenity test to "crush" videos).
224. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victim's Bd., 502 U.S. 105, 118 (1991).
225. 18 U.S.C. § 48 (2008).
226. *See* 145 CONG. REC. H. at 10,267 (in which the members of Congress supporting the bill discuss "crush" videos and the need to have a way to prosecute those responsible for "crush" videos).
227. *Id.*
228. *See* Volokh, *supra* note 112 (stating the statute does not fit into the obscenity exception because the exceptions do not say the work is to be "taken as a whole").
229. 145 CONG. REC. H. at 10,267 (1999).

sidered "crush" videos. If this is done, it may bring about the end of this repulsive industry.