

QUANDARIES OF ANIMAL CRUELTY IN THE DIGITAL AGE

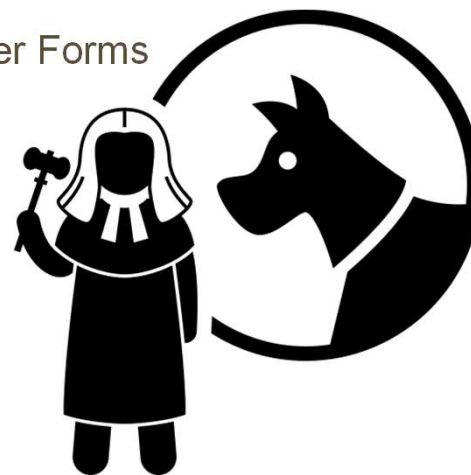
INHERENTLY INJURIOUS?

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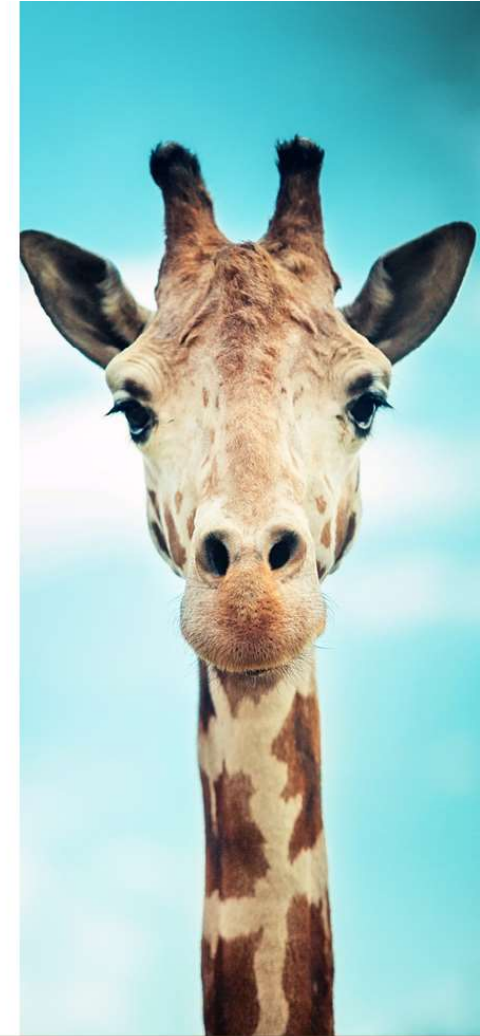
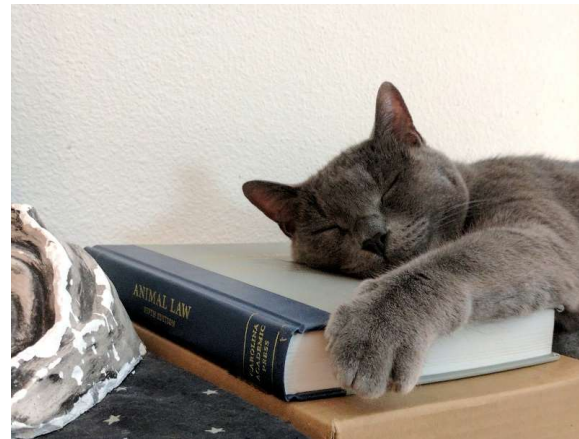
GOALS & CONTEXT

- Brief Overview of Relevant Free Speech Law
- Depictions of Violence Against Animals: Crush Videos & Other Forms
- Looming Constitutional Conflict
- Ways Forward
- (Content Warning)



1ST AMENDMENT FRAMEWORK

- No Laws...
 - “...Abridging the freedom of speech”  Speech Freedoms
- But! 1st Amendment Rights are Neither Absolute nor Unlimited
 - What level of review must law limiting speech / religion survive?
 - Strict scrutiny → [compelling government interest] + [narrowly tailored]
 - Intermediate scrutiny → [important gov interest] + [substantially related]
 - Rational basis review → [legit gov interest] + [reasonably related]
- A Core Animal Law Implication!
 - How compelling is the gov’s interest in animals being free of unlawful cruelty at human hands?



FREEDOM OF SPEECH

- Protections Are Not Absolute
 - Content-based restriction → strict scrutiny
 - Time / place / manner restriction → intermediate scrutiny
 - Unprotected speech → rational basis



• Unprotected Speech Includes...

- ~~Profane Speech~~
- Fighting Words (?)
- Defamation

- *Group* defamation gets iffy

- Obscenity

- Child Pornography — A New Addition per *NY v. Ferber* (1982)

- Inherently harmful: instant as well as on-going
 - 'Benefits' (if any) greatly outweighed
- Trafficking resists other approaches
- Child porn not historically considered protected speech

The Classics per *Chaplinsky v NH* (1942)

• Are There Other Unprotected Speech Areas?

- What of speech specifically harmful to animals?



INTERLUDE: 'CLASSIC' CRUSH VIDEOS

- Images Featuring Erotic Crushing / Mutilation
 - Typically by way of a fem-presenting, dom-style performer
 - 'Soft Crush' vs 'Hard Crush'
- Examples Identifiable At Least Back to 1950s
 - Greatly facilitated by photo / video tech and the internet



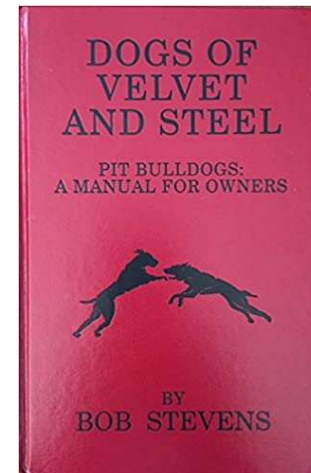
CRUSH LAW I: 18 USC § 48 (1999)

- Prohibits
 - Creation / distribution / possession of
 - Audio or visual recording of
Animal being intentionally and illegally
Maimed / tortured / wounded / killed
- Except if Serious Value
 - Religious
 - Scientific
 - Educational
 - Journalistic
 - Historical
 - Artistic
- Clinton's Signing Statement



CRUSH LITIGATION: *US v. STEVENS*

- Bob Stevens Charged Under 18 USC § 48
 - Video of dogs being fought against other dogs
 - Video of dogs being fought against pigs
 - Video of dogs being used to hunt pigs
- Stevens Raises First Amendment Defense
 - Gov argues animal cruelty should be a new unprotected speech category
- Trial Court
 - Yes, depictions of animal cruelty are unprotected speech, on similar basis as obscenity and child porn
- Third Circuit
 - Declines to recognize new unprotected speech
 - Holds prevention of cruelty not to be a compelling interest



US V. STEVENS: SUPREME COURT'S DECISION

- Animal Cruelty is Not A New Unprotected Speech Area
 - 'Low value' / 'high harm' speech is not inherently unprotected
 - No "long historical tradition ... excluding depictions of animal cruelty from 'the freedom of speech'"
- What Gov Interest in Preventing Cruelty?
 - Declines to rule
 - Does not validate Third Circuit's holding
 - Alito, dissenting → preventing living creatures from experiencing excruciating pain is too a compelling gov interest



CRUSH LAW II: 18 USC § 48 (2010)

- Applies to: Amphibians; Birds; Mammals; Reptiles
- Prohibits
 - Creation or distribution of
 - Still or moving picture depicting
 - Animal being purposefully subject to serious bodily injury (including crushing, burning, drowning, & suffocation) and
Is obscene
- Exceptions for:
 - Veterinary
 - Animal husbandry
 - Food slaughter
 - Hunting / trapping / fishing
 - Research
 - Euthanasia
 - Protection of person / property



CRUSH LITIGATION: *US v. RICHARDS / JUSTICE*

- Defendants Charged Under 18 USC § 48
 - Hard crush videos of crabs, crawfish, chickens, kittens, and puppies
- Defendants Argue Crush ≠ Obscene
 - Because ‘no patently offensive depiction of sexual conduct’
- Trial Court
 - “Animal crush videos depict violence, not sex organs or graphic sex acts...”
 - Per *Brown v. Entertainment Merchants*, violence is not unprotected
- Fifth Circuit
 - Frames cruelty prevention as (at least) a substantial gov interest
 - Reads Crush Law II’s use of “obscene” as meant to incorporate the full *Miller* Test
 - While *Miller* obscenity is usually “obviously sexual act[s]”, can cover less obviously sexual content



US v. MISHKIN:

PRECEDENT THAT DARE NOT SPEAK ITS NAME?

- Defense Argument in 1966's *US v Mishkin*
 - Content is not obscene
 - Does not appeal to the 'average person's' prurient interest in sex
 - "Instead of stimulating the erotic ... disgust[s] and sicken[s]"
- US Supreme Court Rejects → Modifying Prurient Interest Rule
 - "Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement ... is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of *that group*." (italics added)
 - "We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group"



TARGETING CONDUCT: PACT Act (2019)

- “Unlawful for any person to purposefully engage in animal crushing” + Commerce Clause
(‘animal’ = mammals; birds; reptiles; amphibians)
 - Defines “animal crushing” as equivalent to human “serious bodily injury”
 - Extreme physical pain
 - or
 - Protracted impairment of function / obvious disfigurement
 - or
 - Substantial risk of death
- Excepting
 - Customary and normal vet / husbandry / animal management
 - Slaughter for food
 - Hunting / fishing / trapping
 - Lawful sporting activity (that is, lawful under fed law)
 - Predator control
 - Pest control
 - Medical / scientific research
 - As necessary to protect life / property
 - Euthanasia



THE POST-PACT LANDSCAPE

- Hard Crush Largely Retreated to Dark Web
- A Few Cases Involving Sexualized Torture (Not Classic Crush)
 - Some re underlying cruelty, some re video trafficking
 - But! Is sex-linked violence obscene?
- Summer 2023 → Revelation of Bespoke Cruelty Networks
 - Charges being brought – but under what theory?



P Papa 8 days ago
These tree rats are only good for entertainment, abuse, torture, and being killed
👍 🗨️ REPLY

D Deadman 22 days ago
I want to see one put into boiling water
👍 4 🗨️ REPLY

K Kat Lover 19 days ago
Or boiling vegetable oil
👍 🗨️ REPLY

P Atilio 1 month ago
More more more 🍌🍌🍌
👍 🗨️ REPLY

S Sorry not sorry 12 days ago
LOL 😂 Wish i could hit that like button hundred times more! 👍
👍 4 🗨️ REPLY

Mr Ape 00:34
Ok guys need ideas for brutal vids... Be creative

Mr Ape invited **Torture King**

Mr Ape 17:19
I'll let the poll run for a few hours and see what people want.

Mr Ape 08:58
Vids don't get made without donations

Mr Ape invited **Sadistic**

Mr Ape 22:50
I wanna see pain, shock, pain, acceptance of fate.

Mr Ape 13:53
Price for clamp monkey is now 175

Mr Ape 15:14
The only good smell coming from a monkey is gasoline 🔥

Mr Ape 00:48
I've got roughly 3500 vids in my collection

Mr Ape invited **The Immolator**

4. On or about June 21, 2022, another co-conspirator distributed an animal crush video to the Group. That video depicted the torture of a juvenile monkey using a jar of ants and sodomy with an object, causing the juvenile monkey's death.

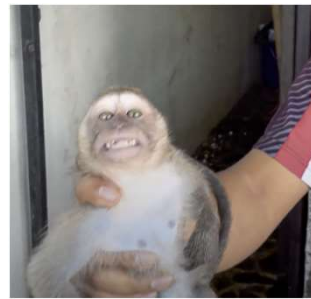
STATUS UPDATE: CRUELTY MEDIA

- 1) 'Classic Crush'
 - Per *Richards / Justice*
 - (Appears to rely on unspoken *Mishkin* analysis)
- 2) Sex-Linked Cruelty
 - Untested constitutionality → seems suspect
- 3) Bespoke Cruelty
 - Cruel conduct: jurisdiction dependent
 - Trafficking: unreachable or approached under dubious obscenity theory
- ~~4) Any Criminal Violence Against Animals~~
 - Per *Stevens*
 - (Implied by *Entertainment Merchants*)
- ~~5) 'Artificial Crush' / Fictional Animals~~
 - Implied by *Ferber*



OUTCOMES & ARGUMENTS

- Addressing Conduct: (IRL Animal) Depicted Cruelty
 - Is the producer/trafficker also the abuser in-jurisdiction? → PACT Act
- Addressing Speech: Sex-Linked Trafficking via Obscenity
 - Requires fact-specific, precise evaluation of intended audience and impact
- Addressing Speech: Bespoke Cruelty
 - Conspiracy-to-Commit / Cruelty-for-Hire theories → requires legislation?
 - E.g. Lacey Act as a model
- Addressing Speech: Other Trafficking
 - Danger of calling for animal cruelty writ large to become unprotected speech (plus, would require overturning *Stevens*)
 - New unprotected speech area?
 - Define in law, culture, and science a narrowly descriptive category
 - Actual animals; vulnerable victims; egregious acts; not historically protected
 - What of harms? → Inherent? On-going?





Mini, currently at Jakarta Animal Aid Network (pending rehab and release to wild)

Thank You! (& Questions)



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“Well-Defined & Narrowly Limited”?

- *Chaplinsky* List is Not Exhaustive
- Factors
 - Injure or Incite
 - Low/No Value
 - ‘as a step to truth’
 - ‘as essential part of idea exposition’
 - ‘Never Thought to Raise Constitutional Problem’
 - ‘historically prohibited’ ?
 - vs
 - ‘not historically permitted’?

Fighting Words



The Arrest of Walter Chaplinsky



Ferber

- Child Porn Unprotected
 - Compelling Interest (Child's Wellbeing)
 - Intrinsically Related (Sexual Abuse)
 - via On-Going Dignitary Harm
 - via Need to Dry-Up Market
 - Integral to Criminal Conduct
 - Low/No Value
 - (No Conflict with Precedent)



Implications

- Does Dignitary Harm Explain the *Ferber/Crush* Distinction?
- If Historical Basis is Key → Is *Stevens* a More Coherent Decision than *Ferber*?
- What Scope, Obscenity?

OUTCOMES & ARGUMENTS

- Depictions of Violence Are Protected Speech
- Federal Crush Video Law
 - Requires sexual component (obscenity)
- Federal PACT Act
 - Regulates underlying conduct, not speech
- Speech Does Not Absolve Conduct
- Gov Interest Status of Animal Protection Still Unclear? 5th Circuit Says 'Substantial'

Protected Speech Can Still Be Evidence of Criminal Conduct

