VIRGINIA LAW REVIEW ONLINE

VOLUME 109 MAY 2023 99–123

ESSAY

THE ANIMAL CRUSHING OFFENSE LOOPHOLE

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The Preventing Animal Cruelty and Torture ("PACT") Act of 2019 established the first federal criminal penalties targeting the most extreme forms of animal abuse. Hailed by humane groups as a watershed moment in the development of animal welfare law, the PACT Act created a new federal crime: "animal crushing"—i.e., the crushing, burning, drowning, suffocation, and impalement of living non-human creatures. But as the first defendants convicted under the PACT Act face sentencing in federal courts, judges and other stakeholders find little direction in the Federal Sentencing Guidelines. The United States Sentencing Commission, which until recently lacked a voting quorum, has yet to promulgate an amendment to the Guidelines that accounts for this change in the law. Instead, the current framework perpetuates a loophole in which the recommended penalty for animal crushing is typically less than the recommendation for offenders convicted of creating or distributing videos of that conduct. As federal prosecutors increasingly bring charges under the PACT Act, this gap in the Guidelines will continue to lead to unjust sentencing disparities that do not adequately reflect the depravity of animal torture.

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This Essay is the first to identify what it terms the "animal crushing offense loophole." It offers three potential solutions on the eve of the Commission's annual amendment cycle: the creation of a new Animal Crushing Guideline, the express recognition of animal victimhood, and the use of a set of sentencing factors that distinguish among animal crushing defendants.

INTRODUCTION

In a 1999 hearing before the House Judiciary Committee, members of Congress were introduced to the growing interstate market in animal "crush videos."[1] Animal crush videos glamorize small creatures being tortured to death in brutal fashion, often for the viewer's sexual gratification.[2] At the time, thousands of crush videos were available for purchase in some of the darkest corners of the internet.[3] One such video, described in graphic detail by the Humane Society of the United States in a 2010 amicus brief, shows a speckled kitten, locked to the ground, shrieking in pain as a woman slams her high-heeled stiletto into its eye socket.[4] Viewers hear the kitten's skull shatter.[5] Yet the woman keeps stomping. By the time the video ends, all that is left of the kitten is a "moist pile of blood-soaked hair and bone."[6]

Following that initial hearing, Congress passed a series of laws that criminalized the creation and distribution of animal crush videos. But those laws contained a crucial exception: the actual conduct depicted in animal crush videos was not subject to a federal penalty. Not until 2019 was the act of "animal crushing"—which is a term of art encompassing the most extreme forms of animal cruelty—prohibited under federal law. The United States Sentencing Commission, however, has yet to promulgate an amendment to the Federal Sentencing Guidelines[7] ("Guidelines" or "U.S.S.G.") that accounts for this change. Today, courts are sentencing animal crushing defendants using guideline calculations

[1] H.R. Rep. No. 111-549, at 2 (2010), *as reprinted in* 2010 U.S.C.C.A.N. 1224, 1225.

[2] Sirin Kale, 'Sometimes They're Boiled Alive': Inside the Abusive Animal Crush Industry, Vice (Nov. 3, 2016, 9:50 AM), https://www.vice.com/en/article/d3gv7q/inside-abusive-animal-crush-fetish-industry [https://perma.cc/63P9-MRJX].

[3] H.R. Rep. No. 111-549, at 2.

[4] Brief for the Humane Society of the United States as Amicus Curiae Supporting Petitioner at 2, United States v. Stevens, 559 U.S. 460 (2010) (No. 08-769).

[5] Id.

[6] Id.

[7] U.S. Sent'g Guidelines Manual (U.S. Sent'g Comm'n 2021).

that do not reflect the depravity of extreme animal abuse. That gap in the Guidelines—which this Essay terms the "animal crushing offense loophole"—presents a serious threat to the administration of justice in cases involving some of the most depraved and sadistic forms of human behavior.

This Essay is the first to identify and offer solutions to this glaring gap in the Federal Sentencing Guidelines. It calls the problem to the attention of the United States Sentencing Commission as it prepares to enter a new amendment cycle in late spring 2023. This Essay also provides guidance to judges, prosecutors, probation officers, and defense attorneys on how to approach sentencing in animal crushing cases. It proceeds in four parts. Part I briefly addresses the history of the federal anti-animal cruelty statute, 18 U.S.C. § 48. Part II explains the animal crushing offense loophole and how it leads to dramatically insufficient recommended guideline sentences for defendants convicted of animal crushing. Part III suggests three reforms that would help courts fashion a sentence that adequately accounts for the cruelty of animal crushing offenses. The Commission could create a new Animal Crushing Guideline; alternatively, it could amend the Guidelines to recognize animal victimhood. In addition, sentencing judges can utilize a set of factors to better distinguish among animal crushing defendants. This Essay concludes by assessing the likelihood of reform.

I. THE HISTORY OF 18 U.S.C. § 48

The federal anti-animal cruelty statute, 18 U.S.C. § 48, was first enacted in 1999. Defining "animal cruelty" as conduct "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," the 1999 law prohibited the knowing creation, sale, or possession of "a *depiction* of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain."[8]

The statute was specifically designed to target the underground market in animal crush videos.[9] Because crush videos rarely reveal the perpetrators' identities, which makes it difficult for state authorities to claim jurisdiction over their creators, Congress determined that the best way to address the underlying abuse was to criminalize the interstate

[8] 18 U.S.C. § 48(a), (c)(1) (1999) (emphasis added).
[9] H.R. Rep. No. 106-397, at 2 (1999).

commercial distribution of videos depicting that abuse.[10] Criminal sanctions for the actual act of torturing an animal remained limited to state anti-cruelty laws.[11]

But in drafting the prohibition on animal crush videos, Congress legislated with an excessively broad hand. The 1999 iteration of § 48 criminalized not just crush videos, but virtually *any* depiction of intentional killing, regardless of whether that killing was in any way "cruel."[12] Despite the statute's specific exceptions for depictions with "serious religious, political, scientific, educational, journalistic, historical, or artistic value,"[13] commentators—including then-President Bill Clinton[14]—expressed concern about the law's potential infringement on free speech.[15]

In 2010, a First Amendment challenge to the first prosecution under § 48 made its way to the U.S. Supreme Court.[16] Robert Stevens was charged with violating § 48 after a joint federal and state investigation found that he had sold videos depicting illegal dog fighting.[17] Although the statute's primary purpose was to disrupt the interstate market in animal crush videos,[18] its broad definition of "depiction of animal cruelty" also encompassed portrayals of intentional wounding or killing

[10] See id. at 3; see also United States v. Stevens, 559 U.S. 460, 491–92 (2010) (Alito, J., dissenting). That strategy proved successful. By 2007, the bill's sponsors declared the crush video industry dead. Id. at 492.

[11] See H.R. Rep. No. 106-397, at 3 (1999).

[12] *Stevens*, 559 U.S. at 474. Granted, the notion of "cruelty" is somewhat subjective. But it is undisputed that the 1999 iteration of § 48 criminalized depictions besides animal crush videos. For example, the 1999 law arguably prohibited hunting-related instructional videos that portrayed the intentional killing of wild animals. Brief for National Rifle Association of America, Inc. as Amicus Curiae Supporting Respondent at 2–3, United States v. Stevens, 559 U.S. 460 (2010) (No. 08-769).

[13] 18 U.S.C. § 48(b) (1999).

[14] Statement on Signing Legislation to Establish Federal Criminal Penalties for Commerce in Depiction of Animal Cruelty, 2 Pub. Papers 2245 (Dec. 9, 1999) ("It is important to avoid constitutional challenge to this legislation and to ensure that the Act does not chill protected speech. Accordingly, I will broadly construe the Act's exception . . . .").

[15] H.R. Rep. No. 106-397, at 10–12 (1999) (noting the objections to the bill on First Amendment grounds by dissenters on the House Judiciary Committee).

[16] See Michael Reynolds, Note, Depictions of the Pig Roast: Restricting Violent Speech Without Burning the House, 82 S. Cal. L. Rev. 341, 345–47 (2009).

[17] Dale Radford, *United States v. Stevens* at 10: Adding a "Prurient Intent" Element to Resolve Constitutional Overbreadth in the Federal Anti-Animal Cruelty Statute, 18 U.S.C. § 48, 1 Hastings J. Crime & Punish. 221, 226 (2020).

[18] H.R. Rep. No. 106-397, at 2 (1999).

that would not constitute a crush video.[19] Those depictions included videos of animal fights.[20] In *United States v. Stevens*, an eight-Justice majority held that § 48 was substantially overbroad, rendering it facially invalid under the First Amendment.[21] Writing for the majority, Chief Justice Roberts concluded that the statute's "alarming breadth" raised irreconcilable constitutional concerns.[22] But in striking down the statute, the Court left open the possibility that a more narrowly-tailored law—one "limited to crush videos or other depictions of extreme animal cruelty"—would be constitutional.[23]

Congress quickly acted in response to the Court's decision in *Stevens*. The Animal Crush Video Prohibition Act of 2010 ("ACVPA")[24] revised § 48 to explicitly prohibit the creation and distribution of animal crush videos *that are obscene*.[25] By prohibiting crush videos that fit within the Court's definition of obscenity, which is not afforded First Amendment protection,[26] Congress sought to insulate the law from constitutional challenge.[27]

The ACVPA provisions make it a crime to knowingly create, sell, market, advertise, exchange, or distribute an animal crush video that is obscene.[28] To prove the obscenity element, the government must satisfy the three-prong test that the Supreme Court articulated in *Miller v. California*.[29] Namely, the government must show that the video: (1) Taken as a whole, lacks serious literary, artistic, political, or scientific

[19] 18 U.S.C. § 48(c)(1) (1999); see Radford, supra note 17, at 228.

[20] Radford, supra note 17, at 226.

[21] 559 U.S. 460, 463, 482 (2010).

[22] Id. at 474. The Court's First Amendment analysis is beyond the scope of this Essay. Several commentators have conducted thorough reviews of the Court's reasoning. See e.g., Abigail Lauren Perdue, When Bad Things Happen to Good Laws: The Rise, Fall, and Future of Section 48, 18 Va. J. Soc. Pol'y & L. 469 (2011) (describing *Stevens*'s place in the Supreme Court's First Amendment jurisprudence); Elizabeth L. Kinsella, Note, A Crushing Blow: *United States v. Stevens* and the Freedom to Profit from Animal Cruelty, 43 U.C. Davis L. Rev. 347 (2009) (same).

[23] *Stevens*, 559 U.S. at 482.

[24] Pub. L. No. 111–294, 124 Stat. 3177 (2010) (codified at 18 U.S.C. § 48).

[25] Radford, supra note 17, at 231.

[26] Roth v. United States, 354 U.S. 476, 492 (1957).

[27] The constitutionality of the ACVPA was affirmed in *United States v. Richards*, 755 F.3d 269 (5th Cir. 2014). The U.S. Court of Appeals for the Fifth Circuit held that because § 48 prohibits creation and distribution of "obscene" material, it "proscribes only unprotected speech." Id. at 276.

[28] See 18 U.S.C. § 48(a)(3), (f)(2).

[29] 413 U.S. 15 (1973).

value; (2) depicts or describes sexual conduct in a patently offensive way; and (3) that "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest.[30]

The ACVPA provisions addressing the creation and distribution of animal crush videos are currently found in § 48(a)(2) and (3):

> **(a) Offenses.**—
>
> > **(2) 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.
> >
> > **(3) 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.[31]

Yet, despite the ACVPA's targeting of the most extreme depictions of animal cruelty, it perpetuated a gap in federal animal welfare law. The actual criminal conduct depicted in the videos—i.e., the crushing, burning, maiming, drowning, and torture of live animals—was still not a federal crime.

Led by the Humane Society of the United States, animal welfare activists began raising awareness of how the lack of a federal analogue to state anti-cruelty laws[32] complicated the prosecution of animal cruelty

[30] Id. at 24; see, e.g., United States v. Whorley, 550 F.3d 326, 335 (4th Cir. 2008). The "prurient interest" refers to material that elicits a sexual response. E.g., Ashcroft v. ACLU, 542 U.S. 656, 679 (2004) (Breyer, J., dissenting); *Roth*, 354 U.S. at 487 n.20 ("[M]aterial having a tendency to excite lustful thoughts.").

[31] 18 U.S.C. § 48(a)(2)–(3).

[32] Historically, federal legislation has generally avoided criminalizing acts of animal abuse. There are some exceptions—for example, the Animal Welfare Act ("AWA") regulates the treatment of animals in certain commercial and scientific settings. See, e.g., 7 U.S.C. § 2144 ("Humane standards for animals by United States Government facilities"). The AWA also contains the federal prohibition against "animal fighting venture[s]," which include dogfighting. See 7 U.S.C. § 2156. But generally speaking, anti-animal cruelty legislation has traditionally been the province of the states. See L.S. Stegman, Do We Need to Make a Federal

cases.[33] The resulting campaign for federal legislation highlighted the long-standing absence of a generalized federal anti-cruelty statute.[34] In 2019, that effort culminated in the passage of the Preventing Animal Cruelty and Torture ("PACT") Act.[35] The PACT Act added a new provision that prohibits animal crushing itself, regardless of whether such conduct is legally "obscene." The animal crushing offense is found in § 48(a)(1):

> **(a) Offenses.**—
>
> > **(1) Crushing.—**It shall be unlawful for any person to purposely engage in animal crushing in or affecting interstate or foreign commerce or within the special maritime and territorial jurisdiction of the United States.[36]

"Animal crushing" is further defined as "actual conduct in which one or more living non-human mammals, birds, reptiles, or amphibians is purposely crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury."[37]

Case Out of It? The Preventing Animal Cruelty and Torture Act as Over-Federalization of Criminal Law, 57 Am. Crim. L. Rev. Online 135, 137–38 (2020).

[33] Niraj Chokshi, There's No Federal Ban on Animal Cruelty. Lawmakers Want to Change That, N.Y. Times (Jan. 30, 2019), https://www.nytimes.com/2019/01/30/us/animal-cruelty-bill-felony.html [https://perma.cc/V5PF-T25Z]. For example, the lack of a federal anti-cruelty law made it difficult to prosecute abuse that occurred across state lines or on federal property. See Stegman, supra note 32, at 140–41.

[34] Chokshi, supra note 33.

[35] Pub. L. No. 116–72, 133 Stat. 1151 (2019) (codified at 18 U.S.C. § 48); see also Hannah Knowles & Katie Mettler, Trump Signs a Sweeping Federal Ban on Animal Cruelty, Wash. Post (Nov. 25, 2019, 8:33 PM), https://www.washingtonpost.com/science/2019/11/25/most-animal-cruelty-isnt-federal-crime-that-changes-monday-when-bipartisan-bill-becomes-law/ [https://perma.cc/EES6-QHS4] (noting that law enforcement officials also supported the PACT Act because it could "stop animal abusers who are likely to commit acts of violence against people").

[36] 18 U.S.C. § 48(a)(1). There are, however, some notable exceptions. Section 48 does not apply to, among other things, the slaughter of animals for food, scientific research, hunting, fishing, or euthanasia as part of a recognized veterinary practice. Id. § 48(d)(1). It also does not apply to "unintentional conduct that injures or kills an animal," id. § 48(d)(3), or to conduct that is otherwise protected by Section 3 of the Religious Freedom Restoration Act of 1993. Id. § 48(d)(4).

[37] Id. § 48(f)(1).

Notably, the new offense in § 48(a)(1) does not include an obscenity element.[38] So while an "animal crush video" must be obscene to violate the creation and distribution provisions in § 48(a)(2) or (3), the actual act of "animal crushing" may violate § 48(a)(1) regardless of whether it is legally obscene.

Since the PACT Act went into effect in 2019, only a handful of defendants nationwide have been prosecuted under § 48(a)(1).[39] As described in Part II, although a defendant can now violate § 48 without ever committing an act of obscenity, the current sentencing scheme remains focused on punishing obscenity. In the absence of updated Federal Sentencing Guidelines that account for changes in the law, courts have been left with little guidance on how to navigate a loophole that does not adequately address the depravity of animal crushing itself.

II. THE ANIMAL CRUSHING OFFENSE LOOPHOLE

Until recently,[40] the United States Sentencing Commission has lacked a voting quorum.[41] As a result, the Commission has been unable to promulgate amendments to the Federal Sentencing Guidelines and their commentary.[42] The most recent amendments to the Commission's *Guidelines Manual* were adopted in 2018 prior to the passage of the PACT Act. The Commission's inability to update the *Manual* has created a loophole in the Guidelines: the prohibition on animal crushing contained in § 48(a)(1) is not explicitly addressed under the current framework.

Before explaining the animal crushing offense loophole, it is worth giving some background on the Federal Sentencing Guidelines. First implemented in 1987, the Guidelines were created, in large part, to avoid "unwarranted sentencing disparities among defendants with similar

[38] Compare id. (defining "animal crushing" without reference to obscenity), with id. § 48(f)(2) (defining "animal crush video" as "any photograph, motion-picture film, video or digital recording, or electronic image" that "depicts animal crushing" and "is obscene").

[39] Position of the United States with Respect to Sentencing at 14, United States v. Kamran, No. 22-cr-20 (E.D. Va. July 21, 2022), ECF No. 25.

[40] Madison Alder, US Sentencing Commission Restocked After Senate Confirmations, Bloomberg L. (Aug. 4, 2022), https://news.bloomberglaw.com/us-law-week/us-sentencing-commission-restocked-after-senate-confirmations [https://perma.cc/UAS6-B3A8].

[41] Charles R. Breyer, A Message from the Acting Chair, U.S. Sent'g Comm'n (Sept. 15, 2021) (available at https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/Cover_Letter.pdf) [https://perma.cc/7CPS-4N9H].

[42] Id.; see also Guerrant v. United States, 142 S. Ct. 640, 641 (2022) (statement of Sotomayor, J., respecting the denial of certiorari) (flagging the lack of a quorum and its effect on the Commission's ability to resolve circuit splits interpreting the Guidelines).

records who have been found guilty of similar criminal conduct."[43] They contain a set of considerations to take into account when sentencing a federal defendant. Those considerations include a base offense level that reflects the seriousness of the underlying offense, as well as specific offense characteristics that can increase a defendant's offense level in light of various aggravating factors. The base offense level is an index number—it does not itself correspond with a recommended term of imprisonment. The specific offense characteristics increase that number depending on the nature of the crime. The defendant's adjusted offense level is the sum of the base offense level plus any increases dictated by the specific offense characteristics. Courts then utilize a table that recommends ranges of imprisonment in months corresponding to the adjusted offense level.[44] The higher the adjusted offense level, the longer the recommended term of imprisonment. The recommended punishment is also influenced by the defendant's criminal history. The same adjusted offense level will lead to a longer recommended term of imprisonment for a defendant with extensive criminal history than for one who is being sentenced for their first offense. Nevertheless, in many cases, the Guidelines recommend narrower sentencing ranges than what the statute of conviction prescribes.[45]

To illustrate, consider a hypothetical defendant convicted of federal kidnapping pursuant to 18 U.S.C. § 1201. The base offense level for a violation of § 1201 is 32.[46] The relevant guideline also includes a specific offense characteristic that increases the base offense level by 2 if a "dangerous weapon was used."[47] Assuming the defendant used a dangerous weapon during the commission of the offense, his adjusted offense level would be 34 (32 + 2 = 34). Turning to the Sentencing Table, if the defendant has no criminal history, an adjusted offense level of 34 leads to a recommended term of imprisonment of 151–188 months.[48]

To calculate the applicable guidelines range, one begins by identifying the offense statute in Appendix A of the *Guidelines Manual*. Appendix A

[43] 28 U.S.C. § 991(b)(1)(B).

[44] The federal Sentencing Table can be found here: https://www.ussc.gov/guidelines/2021-guidelines-manual/annotated-2021-chapter-5 [https://perma.cc/W4HU-VATT].

[45] Federal Sentencing: The Basics, at 6, U.S. Sent'g Comm'n (Sept. 2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/202009_fed-sentencing-basics.pdf [https://perma.cc/FS95-REH4].

[46] U.S. Sent'g Guidelines Manual § 2A4.1(a) (U.S. Sent'g Comm'n 2003).

[47] Id. § 2A4.1(b)(3).

[48] See Sentencing Table, supra note 44.

instructs that all violations of 18 U.S.C. § 48—regardless of subsection—are governed by § 2G3.1 of the Guidelines. Clearly a vestige of the days when § 48 required the government to prove obscenity in conjunction with any offense under the statute, § 2G3.1 is titled, in part, "Importing, Mailing, or Transporting Obscene Matter."[49] The guideline includes a series of specific offense characteristics that are often present in an animal crush video case: a five-level increase for distribution involving pecuniary gain; a two-level increase for offenses involving the use of a computer; and a four-level increase for material "that portrays sadistic or masochistic conduct or other depictions of violence."[50] Notably, those enhancements, by their terms, are largely limited to offenses involving the creation and distribution of animal crush videos. They do not apply in animal crushing cases addressing the underlying conduct. Because an animal crushing defendant's base offense level will not by increased by the specific offense characteristics, the recommended guideline range for a defendant convicted of animal crushing under § 48(a)(1) may be far less than another defendant convicted of creating or distributing an animal crush video. That discrepancy can lead to massive disparities in recommended guideline ranges that do not adequately account for the conduct giving rise to the conviction.[51]

To illustrate this loophole in the Guidelines, consider the following hypothetical: Defendant *A*, an 18-year-old man, brutalizes his 4-month-old Chihuahua puppy by breaking its skull and ribs. As the puppy lays dying, he slits the dog's throat, leaving it to bleed out on the floor of his bathroom. The puppy is left to suffer for two hours, and despite miraculously surviving the initial cruelty, is later euthanized. Why did he do it? Because the puppy had become "moody."[52] Defendant *A* never

[49] U.S. Sent'g Guidelines Manual § 2G3.1 (U.S. Sent'g Comm'n 2016).

[50] Id. § 2G3.1(b)(1)(A), (b)(3), (b)(4).

[51] See also Animal Legal Def. Fund, Animal Legal Defense Fund Position Statement: Sentencing for Animal Cruelty Crimes 1–2, https://perma.cc/HN7U-HQ7J. ("Our criminal justice system generally ranks crimes by their perceived severity, ascribing the harshest sentences to those crimes which society has deemed most reprehensible. Therefore the sentences for harming an animal should be *at least* as punitive as those in place to protect inanimate objects, as animals are living, sentient beings who deserve better protection than non-sentient property.").

[52] Tragically, this hypothetical is based on the first prosecution under 18 U.S.C. § 48(a)(1). See Government's Sentencing Position for Defendant Angel Ramos-Corrales, United States v. Ramos-Corrales, No. 21-cr-123 (C.D. Cal. Oct. 18, 2021), ECF No. 42; Riverside Man Gets 2 Years in Prison for Slitting Puppy's Throat, Posting Videos of Torture Online, Fox 11 L.A.

films the torture, and he does not commit the torture in a way that, under Supreme Court precedent, is "obscene." Defendant *A* is convicted of one count of animal crushing in violation of 18 U.S.C. § 48(a)(1).

Now consider Defendant *B*, who is also 18 years old. While searching the internet, Defendant *B* comes across a video of a young man repeatedly stabbing a female hamster's genitals with a pencil. While laughing, the young man makes remarks indicating his disdain for women.[53] Defendant *B* uses his computer to email the video to his friend. At no point did Defendant *B* participate in the physical torture of the living hamster. He is convicted of one count of distributing an animal crush video in violation of 18 U.S.C. § 48(a)(3).

Defendant *A*'s guideline calculation would look something like this: Because he was convicted of violating 18 U.S.C. § 48, the base offense level articulated by § 2G3.1 is 10. However, none of the specific offense characteristics apply—after all, those enhancements only apply when a *portrayal* of obscene material has been *distributed*. Assuming he pleads guilty (thereby taking advantage of a two-level reduction for acceptance of responsibility)[54] and lacks prior criminal history, he will have an adjusted offense level of 8 with a recommended guideline range of 0–6 months' imprisonment.[55] Because Defendant *A*'s recommended guideline range falls in Zone A on the Sentencing Table, the judge can choose to sentence Defendant *A* to probation in lieu of imprisonment.[56]

Compare that with Defendant *B*'s guideline calculation. His calculation starts at the same base offense level of 10, but the U.S. Probation Office will likely add points for use of a computer facility (+2) and distribution of "material that portrays sadistic or masochistic conduct" (+4). With the same assumptions about prior criminal history and the two-level reduction for acceptance of responsibility, Defendant *B*'s conduct would lead to an adjusted offense level of 14. However, because the defendant pleaded guilty, the government may move to decrease the offense level

(Nov. 2, 2021), https://www.foxla.com/news/riverside-man-gets-2-years-in-prison-for-slitting-puppys-throat-posting-videos-of-torture-online [https://perma.cc/CXU5-K235].

[53] This hypothetical is based on another § 48(a)(1) prosecution in the Eastern District of Virginia. See Statement of Facts, United States v. Kamran, No. 22-cr-20 (E.D. Va. Apr. 21, 2022), ECF No. 20.

[54] See U.S. Sent'g Guidelines Manual § 3E1.1(a) (U.S. Sent'g Comm'n 2018).

[55] See Sentencing Table, supra note 44.

[56] See U.S. Sent'g Guidelines Manual § 5C1.1(b) (U.S. Sent'g Comm'n 2018).

by one additional level pursuant to U.S.S.G. § 3E1.1(b).[57] Assuming the court accepts the additional one-level decrease, Defendant *B*'s final adjusted offense level would be 13, which corresponds with a recommended guideline range of 12–18 months' imprisonment.[58] That is at least double the amount of time recommended for Defendant *A*.

This anomaly defies common sense. The act of distributing an animal crush video, while both criminal and reprehensible, pales in comparison to the brutality of intentionally maiming a four-month-old puppy. To be clear, the Federal Sentencing Guidelines are advisory,[59] and a sentencing court could craft a sufficient sentence in a § 48(a)(1) case using an upward departure or by imposing an above-guidelines variant sentence after considering the sentencing factors found in 18 U.S.C. § 3553(a).[60] But as a matter of law, sentencing courts are required to begin by properly calculating the guidelines[61] before using them as the "starting point"[62] in their sentencing decision. A sentencing scheme that recommends little, if any, imprisonment for someone like Defendant *A* does not ensure that punishment is proportionate to the seriousness of the offense.[63]

Under the current sentencing scheme and until the Commission amends the Guidelines, the proper first step in calculating the guidelines for an animal crushing offense should be to look instead to § 2X5.1 of the *Guidelines Manual*.[64] That provision urges sentencing courts to "apply the most analogous offense guideline" if "the offense is a felony for which

[57] If a defendant's adjusted offense level is 16 or greater prior to any reductions for acceptance of responsibility, the court can decrease the adjusted offense level by one additional level "upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty." U.S. Sent'g Guidelines Manual § 3E1.1(b) (U.S. Sent'g Comm'n 2018). Because Defendant *B*'s adjusted offense level prior to any reductions for acceptance of responsibility was 16 (10 + 2 + 4), he would be eligible for the additional one-level reduction in § 3E1.1(b).

[58] See Sentencing Table, supra note 44.

[59] United States v. Booker, 543 U.S. 220, 245–46 (2005).

[60] See Federal Sentencing: The Basics, supra note 45, at 28–29.

[61] Rita v. United States, 551 U.S. 338, 347–48 (2007).

[62] Gall v. United States, 552 U.S. 38, 49 (2007).

[63] See 18 U.S.C. § 3553(a)(2)(A); see also Mistretta v. United States, 488 U.S. 361, 374 (1989) (articulating goals of the Sentencing Reform Act of 1984, which created the Federal Sentencing Guidelines).

[64] While this step, in the author's opinion, is correct as a matter of law, it still does not lead to a guideline recommendation that accurately reflects the abhorrent nature of animal crushing. Part III suggests an amendment to the Guidelines that explicitly sets out a new offense guideline for use in animal crushing cases.

no guideline *expressly* has been promulgated."[65] That is the case for violations of § 48(a)(1). Because the Guidelines have not been amended since 2018, one year prior to the passage of the PACT Act, no offense guideline has been expressly promulgated to address the animal crushing offense created by the Act. To be sure, the existing offense guideline for § 48—U.S.S.G. § 2G3.1—*does* apply to violations of § 48(a)(2) and (3). Those crimes involve the creation and distribution of obscene material,[66] and thus the "[o]bscenity" guideline found in § 2G3.1 is a proper tool for calculating a recommended guideline range. But as previously noted, the obscenity guideline is not a proper offense guideline for a crime that need not ever involve obscenity.[67]

The "most analogous offense guideline" is the animal fighting venture guideline under U.S.S.G. § 2E3.1. While not equivalent to animal crushing, animal fighting likewise causes severe injury (and often death) to an animal.[68] In 2016, the Sentencing Commission raised the base offense level in § 2E3.1 for most animal fighting ventures from 10 to 16. It did so to "better account[] for the cruelty and violence that is characteristic of [those] crimes."[69]

However, the animal fighting guideline has its limitations. The base offense level is capped at 16 without providing for any increases based on specific offense characteristics.[70] Let's return to Defendant *A*. If his recommended sentence was calculated pursuant to the animal fighting venture guideline found in § 2E3.1, his adjusted offense level—again, assuming he pleads guilty and accepts responsibility—would be 13.[71] An adjusted offense level of 13 results in a guideline range of 12–18 months' imprisonment.[72] Note that the maximum *guideline* sentence

[65] U.S. Sent'g Guidelines Manual § 2X5.1 (U.S. Sent'g Comm'n 2014) (emphasis added).

[66] See U.S. Sent'g Guidelines Manual § 2G3.1 (U.S. Sent'g Comm'n 2016).

[67] Moreover, the application notes to § 2G3.1 make clear that "[m]ost federal prosecutions for offenses covered in this guideline are directed to offenses involving distribution for pecuniary gain. Consequently, the offense level under this section generally will be at least 15." Id. That is not necessarily the case in a § 48(a)(1) prosecution.

[68] See U.S. Sent'g Guidelines Manual § 2E3.1 cmt. n.2 (U.S. Sent'g Comm'n 2018) ("[A] defeated animal often is severely injured in the fight, dies as a result of the fight, or is killed afterward.").

[69] 81 Fed. Reg. 27262, 27265 (May 5, 2016).

[70] See U.S. Sent'g Guidelines Manual § 2E3.1 (U.S. Sent'g Comm'n 2016).

[71] Like the hypothetical with Defendant *B*, this calculation is premised on the two-level reduction for acceptance of responsibility plus the government moving for the additional one-level reduction in U.S.S.G. § 3E1.1(b).

[72] See Sentencing Table, supra note 44.

recommended in that situation—18 months—is five and a half years shorter than the seven-year *statutory* maximum passed by Congress when it decided to criminalize animal crushing.[73] The current sentencing scheme does not adequately address the seriousness of animal crushing if the guideline recommendation is significantly shorter than what Congress deemed appropriate when it chose to make animal crushing a federal crime.

That framework does not account for the abhorrent nature of animal crushing. As brutal as animal fighting is, it does not necessarily involve the same kind of direct and deliberate torture that is required for a § 48(a)(1) conviction. In fact, the application notes to the animal fighting guideline even acknowledge that there are some types of extreme abuse that are not accounted for by the base offense level.[74] An upward departure may be appropriate if "the [animal fighting venture] involved extraordinary cruelty to an animal . . . (such as by killing an animal in a way that prolongs the suffering of the animal)."[75] Unfortunately, such "extraordinary cruelty" that "prolongs the suffering of the animal" is exactly what distinguishes animal crushing from other forms of animal abuse, like dogfighting.

A new sentencing regime is needed to rectify the current Guidelines' limitations in addressing animal crushing offenses. That could mean amending the Guidelines to create provisions that explicitly address animal crushing. It could also mean increasing awareness among judges, prosecutors, probation officers, and defense attorneys about the unique characteristics of § 48(a)(1) offenses. Part III proposes three reforms. Some would be more difficult to implement than others, but all have the potential to lead to sentences that more accurately account for the extreme brutality and dangerousness exhibited by animal crushing defendants.

III. POTENTIAL REFORMS

This Part offers three potential reforms to the current sentencing scheme for animal crushing offenses. The first reform—the creation of a new Animal Crushing Guideline—would be the most difficult to implement. The Sentencing Commission would have to utilize a formal

[73] 18 U.S.C. § 48(c).
[74] See U.S. Sent'g Guidelines Manual § 2E3.1 cmt. n.2 (U.S. Sent'g Comm'n 2016).
[75] Id.

amendment process that includes public notice and comment.[76] Even if the Commission votes to promulgate a final amendment, Congress could still reject it.[77] The second reform—amending the Guidelines to recognize animals as "victims"—would be similarly difficult, although it would not require the creation of a completely new offense guideline. The final reform—providing judges and other stakeholders with a set of factors to consider when sentencing animal crushing defendants—does not require any action by the Commission.

A. The Animal Crushing Guideline

Chapter Two of the *Guidelines Manual* contains "offense guidelines" for hundreds of federal crimes.[78] Appendix A identifies the offense guideline applicable to the statute of conviction.[79] As previously noted, that guideline typically contains (1) the base offense level that serves as the starting point for calculating the recommended guideline range, and (2) "specific offense characteristics" which, if present in a particular case, tend to increase the offense level. That increased offense level leads to a longer recommended guideline range.

The "most closely analogous" offense guideline—the animal fighting venture guideline found in § 2E3.1 of the *Guidelines Manual*—does not address the extreme brutality inherent in a § 48(a)(1) prosecution. Nor was the obscenity guideline found in § 2G3.1—which is currently the guideline that the *Manual* references for all violations of 18 U.S.C. § 48—ever meant to cover animal crushing. Rather than rely on the existing framework, the Sentencing Commission could promulgate a new offense guideline that specifically covers animal crushing offenses. This Essay proposes a new guideline scheme based on the animal fighting venture guideline that also incorporates specific offense characteristics modeled on other provisions in the *Guidelines Manual*. A novel Animal Crushing Guideline could look something like this:

[76] The U.S. Sentencing Commission's Amendment Cycle, U.S. Sent'g Comm'n, https://www.ussc.gov/sites/default/files/pdf/about/overview/InFocus_Amendment-Cycle.pdf [https://perma.cc/XNZ5-2FXJ] (last accessed on Apr. 23, 2023).

[77] Id.

[78] See Federal Sentencing: The Basics, supra note 45, at 20.

[79] U.S. Sent'g Guidelines Manual app. A (U.S. Sent'g Comm'n 2014).

§ 2Q2.3 – Offenses Involving Cruelty to Animals

(a) Base Offense Level: **18**

(b) Specific Offense Characteristics

(1) If the animal victim was physically restrained during the offense, increase by **2** levels.

(2) If the defendant knowingly caused an individual who has not attained the age of 16 to witness the offense, increase by **2** levels.

(3) If the offense involves sexual exploitation of the animal victim, increase by **2** levels.

Commentary

Statutory Provisions: 18 U.S.C. § 48(a)(1).

Application Notes:

1. Definitions. – For purposes of this guideline:

"Physically restrained" is defined in the commentary to § 1B1.1 (Application Instructions).

"Sexual exploitation" includes offenses set forth in 18 U.S.C. §§ 2241, 2242.

The Animal Crushing Guideline would be located in Part Q, which lists "Offenses Involving the Environment."[80] Section 2 of Part Q specifically delineates "Conservation and Wildlife" offenses.[81] While it is not the perfect fit for an animal cruelty guideline,[82] Part Q makes more sense than Part E (which includes the animal fighting venture guideline) or Part G (which includes the obscenity guideline). Those Parts contain, respectively, "Offenses Involving Criminal Enterprises and Racketeering" and "Offenses Involving Commercial Sex Acts, Sexual Exploitation of Minors, and Obscenity," neither of which evoke animal cruelty.

[80] U.S. Sent'g Guidelines Manual ch. 2, pt. Q (U.S. Sent'g Comm'n 2018).

[81] Id. § 2.

[82] Domestic pets, which are often the victims of animal crushing, are not "wildlife." See 50 C.F.R. § 10.12 (defining "wildlife").

The base offense level of 18 is a two-level increase from the level found in the animal fighting venture guideline.[83] There are two primary reasons for a higher base offense level. First, Congress has evinced an intent to punish animal crushing offenses more severely than animal fighting ventures. Whereas the statutory maximum penalty for violating the animal fighting venture statute is five years' imprisonment,[84] the statutory maximum penalty for violating § 48(a)(1) is seven years' imprisonment.[85] Second, the animal fighting venture guideline itself recognizes that there are situations in which a base offense level of 16 does not accurately capture the severity of a defendant's conduct. Those situations, where a defendant exhibits "extraordinary cruelty," are endemic to animal crushing cases.[86]

The Animal Crushing Guideline, unlike its animal fighting venture counterpart, includes specific offense characteristics that allow for increases in the offense level based on a series of aggravating factors.

1. Physical Restraint

The two-level increase for "physically restrain[ing]"[87] an animal victim is modeled on the nearly identical victim-related adjustment found in U.S.S.G. § 3A1.3.[88] Restraining an animal victim is an aggravating factor because it prevents the animal from attempting escape or defending itself at all. To see how this enhancement would apply in practice, consider *United States v. Kamran*.[89] In *Kamran*, the defendant used black binder clips to restrain a hamster before slowly torturing it to death.[90] Due to its inability to move, the hamster was unable to attempt escape, and instead, it was forced to endure excruciating pain before ultimately succumbing

[83] See U.S. Sent'g Guidelines Manual § 2E3.1 (U.S. Sent'g Comm'n 2016) (setting out a base offense level of 16).

[84] 7 U.S.C. § 2156; 18 U.S.C. § 49(a).

[85] 18 U.S.C. § 48(c).

[86] See supra notes 74 & 75 and accompanying text.

[87] The application notes to U.S.S.G. § 1B1.1 define "physically restrained" as "the forcible restraint of the victim such as by being tied, bound, or locked up." U.S. Sent'g Guidelines Manual § 1B1.1 (U.S. Sent'g Comm'n 2018).

[88] At least two other offense guidelines also provide for an increase where the defendant unlawfully restrained the victim. See U.S. Sent'g Guidelines Manual § 2A4.1(b)(7) (U.S. Sent'g Comm'n 2003) (restraint in the course of kidnapping); U.S. Sent'g Guidelines Manual § 2B3.1(b)(4)(B) (U.S. Sent'g Comm'n 2018) (restraint in the course of a robbery).

[89] No. 22-cr-20 (E.D. Va.).

[90] See Statement of Facts at 2, United States v. Kamran, No. 22-cr-20 (E.D. Va. Apr. 21, 2022), ECF No. 20.

to the defendant's torture. In restraining the hamster so that he could more easily inflict pain and suffering, the defendant exhibited an even more extreme brand of criminality that warrants an increase to the base offense level.

2. Exposure to a Minor

The two-level increase for causing a minor to witness the offense stems from a similar provision in the federal animal fighting venture statute. The Animal Fighting Spectator Prohibition Act of 2014 makes it a felony to knowingly cause a minor to view an animal fighting venture, such as a dogfight or cockfight.[91] One of the law's aims is to prevent children from being desensitized to extreme violence.[92] That rationale carries over to animal crushing cases in which children may observe incredible brutality being inflicted upon a defenseless creature. Such exposure can undoubtedly be a traumatic experience—research indicates that witnessing animal cruelty can be a predictor of aggression and violence in children.[93] Children who witness animal cruelty may also be more likely to abuse animals in the future.[94] By causing a child to witness extreme animal abuse, a defendant is inflicting additional harm that the Guidelines must consider.

3. Bestiality

Finally, the two-level increase for sexually exploiting the animal victim is designed to account for a relatively novel interpretation of § 48(a)(1). Because the definition of animal crushing cross-references to federal provisions criminalizing sexual abuse,[95] § 48(a)(1) could potentially

[91] See Pub. L. No. 113–79, tit. XII, § 12308(b)(1), 128 Stat. 990, 990–91 (2014) (codified at 7 U.S.C. § 2156(a)(2)(B)); New Federal Law on Animal Fighting, U.S. Att'ys Off. for the Middle Dist. of Ala. (Mar. 13, 2014), https://www.justice.gov/usao-mdal/pr/new-federal-law-animal-fighting [https://perma.cc/E8D9-HLC9].

[92] New Federal Law on Animal Fighting, supra note 91.

[93] Roshni Trehan Ladny & Laura Meyer, Traumatized Witnesses: Review of Childhood Exposure to Animal Cruelty, 13 J. Child & Adolescent Trauma 527, 527–28 (2020).

[94] Id.

[95] See 18 U.S.C. § 48(f)(1) (animal crushing includes inflicting "serious bodily injury . . . that, if committed against a person and in the special maritime and territorial jurisdiction of the United States, would violate [S]ection 2241 or 2242 [criminalizing aggravated sexual abuse and sexual abuse]").

encompass sexual acts between persons and live animals.[96] To date, that theory has only been advanced in one case interpreting the animal crushing definition for purposes of the animal crush video provisions in § 48(a)(2) and (3).[97] There, the U.S. District Court for the Northern District of Georgia held that "a reasonable reading of § 48 does proscribe bestiality."[98] There is some research suggesting a link between bestiality and sexual offenses against humans, including where the offender engaged in bestiality while they were a juvenile.[99] A two-level increase to the defendant's offense level reflects the potential danger posed by such behavior.

The Animal Crushing Guideline more accurately reflects the callous violence exhibited in animal crushing cases. It invariably recommends more punitive sanctions than the existing framework, and because the defendant's offense level will always fall in Zone D on the Sentencing Table, the minimum recommended guideline sentence will always include a term of imprisonment.[100] It is more flexible in that it includes enhancements that account for aggravating factors that may be present in a given case. It also is not unnecessarily punitive. A defendant with no prior criminal history who pleads guilty and does not engage in any conduct triggering the specific offense characteristics is likely looking at an adjusted offense level of 15.[101] An offense level of 15 corresponds with a recommended guideline range of 18–24 months' imprisonment.[102] While still weighty, a sentence in that range remains "sufficient, but not greater than necessary" to achieve the goals of sentencing.[103]

[96] See United States v. Vincent, No. 21-cr-10, 2022 WL 2452301, at *6 (N.D. Ga. July 6, 2022).

[97] See id. Although the defendant in a different case, *United States v. Richards*, was not alleged to have had sex with an animal, the Fifth Circuit concluded in a footnote that the statute covers sexual abuse of animals. 755 F.3d 269, 272 n.6 (5th Cir. 2014) ("[Section] 48 proscribes bestiality.").

[98] *Vincent*, 2022 WL 2452301, at *6 (agreeing with the *Richards* court).

[99] See Brian J. Holoyda & William J. Newman, Childhood Animal Cruelty, Bestiality, and the Link to Adult Interpersonal Violence, 47 Int'l J.L. & Psychiatry 129, 132 (2016).

[100] A carceral sentence is necessary in cases where a defendant "purposely crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury" another living creature. 18 U.S.C. § 48(f)(1).

[101] Once again, this calculation assumes that the government would move for the additional one-level reduction in U.S.S.G. § 3E1.1(b). U.S. Sent'g Guidelines Manual § 3E1.1 (U.S. Sent'g Comm'n 2018).

[102] See Sentencing Table, supra note 44.

[103] 18 U.S.C. § 3553(a).

Let's return one final time to Defendant *A*. Under the Animal Crushing Guideline, Defendant *A*'s adjusted offense level is 15.[104] The corresponding guideline range of 18–24 months' imprisonment is higher than the 12–18 months recommended for Defendant *B*. Under this new framework, a defendant who physically tortures an animal will rightfully face a longer recommended sentence than one who distributes a video of that torture.

B. Recognizing Animal Victimhood Under the Guidelines

Animals are afforded fewer legal protections than humans.[105] Under the current Guidelines, "victims" must be "person[s]."[106] Accordingly, the suffering that animal victims experience is not accounted for in the *Guideline Manual*'s Chapter III victim-related adjustments. Those adjustments, when applied, increase a defendant's recommended guideline range.[107]

Instead of creating a new guideline for animal crushing offenses, the Sentencing Commission could take the alternative approach of explicitly recognizing animals as "victims" under the Guidelines. That acknowledgement would, like a new offense guideline, require a formal amendment process. However, in the absence of a more complete guideline framework addressing extreme animal cruelty, this reform would give sentencing stakeholders another tool to use when calculating a recommended sentencing range that adequately reflects the defendant's offense conduct.

This amendment is premised, of course, on a belief that animals who are subjected to extreme cruelty are in fact victimized. That seems like an obvious assumption on its face, but the concept of animal victimhood has

[104] The same assumptions about acceptance of responsibility and criminal history apply.

[105] See Luis E. Chiesa, Why is it a Crime to Stomp on a Goldfish?—Harm, Victimhood and the Structure of Anti-Cruelty Offenses, 78 Miss. L.J. 1, 4–5 (2008) (describing inconsistences in legal protections for animals). Even among different species of animals, some have more legal protections than others. See, e.g., N.Y. Agric. & Mkts. Law § 353-a (McKinney 1999) (limiting felonies to acts of cruelty performed on "companion animal[s]"); see also Justin Marceau, Palliative Animal Law: The War on Animal Cruelty, 134 Harv. L. Rev. F. 250, 253 (2021) (arguing that the PACT Act itself "mandates a hierarchy that all but guarantees inequitable treatment and suffering among animals").

[106] See U.S Sent'g Guidelines Manual § 3D1.2 cmt. n.2 (U.S. Sent'g Comm'n 2007); see also 18 U.S.C. § 3771(b)(2)(D) (defining "crime victim" for purposes of the Crime Victims' Rights Act).

[107] See Federal Sentencing: The Basics, supra note 45, at 25.

a more nuanced history. The first anti-animal cruelty laws in the United States only made it a crime to abuse animals owned by another person.[108] That limitation suggests that the impetus for anti-cruelty legislation was not to punish abuse against animal victims, but to protect human property interests.[109] Under that conception, "as far as the law is concerned, . . . animals are nothing more than commodities."[110] Modern laws, however, have diverged from the emphasis on property rights. Today, animal abuse is typically a crime irrespective of the animal's status as property.[111] Moreover, criminalizing animal abuse should not be perceived solely as a means of enforcing moral standards. Courts are often skeptical of subjective assessments of morality as a rationale for criminal punishment.[112] This leads to the conclusion that society should punish animal cruelty, at least in part, because it wants to protect the animals themselves from harm.[113] A justification for anti-cruelty legislation that focuses on the harm to the animal necessarily views the animal, and not its human owner, as a potential victim.[114]

The current Guidelines do not reflect this notion of animal victimhood. Amending the Guidelines to explicitly acknowledge that animals can be "victims" could have the practical effect of increasing an animal crushing defendant's offense level. There are at least two victim-related adjustments where this change could make a difference.

First, if "a victim was physically restrained in the course of the offense,"[115] a two-level increase is warranted under U.S.S.G. § 3A1.3. This provision is distinct from the two-level restraint enhancement included in the proposed offense guideline discussed earlier.[116] This victim-related adjustment is only triggered in the absence of a specific

[108] Chiesa, supra note 105, at 8–9.

[109] Id. at 9.

[110] Gary L. Francione, Reflections on Animals, Property, and the Law and Rain Without Thunder, 70 L. & Contemp. Probs. 9, 9 (2007).

[111] Chiesa, supra note 105, at 63.

[112] See, e.g., Lawrence v. Texas, 539 U.S. 558, 577–78 (2003); United States v. Windsor, 570 U.S. 744, 770–72 (2013).

[113] Chiesa, supra note 105, at 65.

[114] See State v. Nix, 334 P.3d 437, 447–48 (Or. 2014), (holding that animals themselves, and not the animal owner, are "victims" under Oregon's animal cruelty statute), *vacated on procedural grounds*, 345 P.3d 416 (Or. 2015).

[115] U.S. Sent'g Guidelines Manual § 3A1.3 (U.S. Sent'g Comm'n 1991).

[116] See supra Section III.A.

offense characteristic that accounts for physical restraint of a victim.[117] Thus, under the current guideline framework, physical restraint of an animal victim would be incorporated into the guideline calculation even if a sentencing court uses the obscenity guideline to start its analysis.

Second, the two-level "vulnerable victim" adjustment in U.S.S.G. § 3A1.1 could apply. A "vulnerable victim" is "unusually vulnerable due to age, physical or mental condition," or some other factor that makes them "particularly susceptible to the criminal conduct."[118] Granted, defenseless animals are inherently vulnerable, and it may be difficult to distinguish which animal victims are *unusually* vulnerable. But amending the Guidelines to recognize animal victimhood would be yet another sentencing tool in a hypothetical case where the animal victim was particularly defenseless to the defendant's cruelty.

C. Factors to Distinguish Among § 48 Defendants

Under the current version of the Sentencing Guidelines, an animal crushing defendant will have their recommended guideline sentence calculated using the same offense guideline as a defendant who was convicted of distributing an animal crush video.[119] The seriousness of those two offenses is not the same. If the Sentencing Commission is unable to make the kinds of amendments outlined above, sentencing courts still need a framework to distinguish among § 48 defendants. After a court has properly calculated the appropriate guideline range, it must consider the statutory sentencing factors found in 18 U.S.C. § 3553(a).[120] Those factors tell a court to consider both aggravating and mitigating circumstances before imposing a sentence.[121] The following non-exhaustive list sets out a series of specific factors that sentencing courts could consider when conducting the § 3553(a) analysis for an animal crushing defendant.[122]

[117] U.S. Sent'g Guidelines Manual § 3A1.3 cmt. n.2 (U.S. Sent'g Comm'n 1991) ("Do not apply this adjustment where the offense guideline specifically incorporates this factor, or where the unlawful restraint of a victim is an element of the offense itself . . . .").

[118] U.S. Sent'g Guidelines Manual § 3A1.1 cmt. n.2 (U.S. Sent'g Comm'n 2010).

[119] See supra Part II for a discussion of the animal crushing offense loophole.

[120] See Gall v. United States, 552 U.S. 38, 49–50 (2007).

[121] See id. at 50 n.6.

[122] A similar tool has been advanced for use in child pornography cases. Cf. United States v. Muzio, 966 F.3d 61, 77–79 (2d Cir. 2020) (Underhill, J., dissenting) (articulating a set of factors that judges should consider when sentencing child pornography offenders).

1. What was the nature of the cruelty inflicted? Some forms of torture—burning, crushing, impaling—are arguably crueler than others.[123]

2. To what extent did the defendant subject the animal victim to *extreme* pain? Many animals feel physical and psychological pain in ways that are similar to humans.[124] Subjecting an animal to excruciating pain reflects serious wrongdoing.

3. Did the offense involve the use of fire? The "MacDonald triad" posits that fire setting, bed-wetting, and animal cruelty, when committed by the same person, are correlated with violent crime later in life.[125] A more punitive approach may be necessary to deter or incapacitate an individual who has exhibited particularly worrisome behavior.

4. For how long did the defendant torture the animal victim? Lengthy cruelty that prolongs the animal's suffering should be considered an aggravating factor.

5. Were there multiple animal victims? Was the animal victim pregnant?[126] The number of animal victims reflects the seriousness of the offense.

6. Did the offense involve postmortem dismemberment? Such behavior can be indicative of intent to destroy evidence of a crime.

7. Were other illegal acts committed during the torture? The Federal Sentencing Guidelines allow judges to consider uncharged "[r]elevant [c]onduct" that occurs during the commission of the offense, in

[123] For example, a Mobile, Alabama man pleaded guilty to one count of animal crushing after he shot a police K-9 while trying to evade arrest. Inflicting severe bodily injury on an animal is always repugnant; however, this defendant's conduct was arguably less cruel than a defendant who slowly tortures an animal to death. See Alabama Man Pleads Guilty to 'Animal Crushing' in Death of Mississippi K9 Officer. He Also Pleaded to Being Felon with Firearm, Magnolia State Live (Aug. 3, 2022), https://www.magnoliastatelive.com/2022/08/03/alabama-man-pleads-guilty-to-animal-crushing-in-death-of-mississippi-k9-officer-he-also-pleaded-to-being-felon-with-firearm/ [https://perma.cc/LEL9-Z6KW].

[124] Mirko Bagaric, Jane Kotzmann & Gabrielle Wolf, A Rational Approach to Sentencing Offenders for Animal Cruelty: A Normative and Scientific Analysis Underpinning Proportionate Penalties for Animal Cruelty Offenders, 71 S.C. L. Rev. 385, 420–22 (2019).

[125] Justin Marceau, Beyond Cages: Animal Law and Criminal Punishment 206 (2019).

[126] This consideration tracks with federal law recognizing that a fetus in utero is a legal victim if they are injured or killed during the commission of an enumerated crime of violence. See 18 U.S.C. § 1841.

> preparation for that offense, or while attempting to avoid detection for that offense.[127]
>
> 8. Was the defendant employed in a field that required them to care for animals (e.g., veterinarian, zookeeper, dog groomer)? Animal crushing defendants who have been trusted to treat animals with respect are particularly culpable.[128]

After considering these factors, a sentencing court will be better prepared to impose a sentence that adequately reflects the seriousness of an animal crushing offense. That sentence may include a term of supervised release. A violation of § 48(a)(1) is punishable by a statutory maximum term of seven years' imprisonment,[129] which means the offense is a Class C felony.[130] For Class C felonies, the court may impose a supervised release term for up to three years.[131] A term of supervised release is warranted in animal crushing cases, especially if the court imposes a special condition that requires a defendant to undergo an animal cruelty-specific psychiatric evaluation.[132]

CONCLUSION

For the first time in more than three years, the United States Sentencing Commission has a voting quorum.[133] The newly constituted Commission has already indicated its desire to address some of the sentencing issues that have arisen since the most recent guideline amendments went into effect in 2018. In fall 2022, the Commission announced that it was seeking public comment on possible policy priorities for its first

[127] See U.S. Sent'g Guidelines Manual § 1B1.3 (U.S. Sent'g Comm'n 2015).

[128] Cf. U.S. Sent'g Guidelines Manual § 2A3.2(b)(1) (U.S. Sent'g Comm'n 2010) (outlining a specific offense characteristic that increases a defendant's base offense level by 4 if they committed criminal sexual abuse of a minor while the victim was in their "custody, care, or supervisory control"). The Guidelines offer "teachers, day care providers, [and] baby-sitters" as examples of temporary caregivers subject to the "Custody, Care, or Supervisory Control Enhancement." See id. § 2A3.2 cmt. n.2(A).

[129] 18 U.S.C. § 48(c).

[130] 18 U.S.C. § 3581(b)(3).

[131] 18 U.S.C. § 3583(b)(2).

[132] Cf. Ashley Kunz, Skinning the Cat: How Mandatory Psychiatric Evaluations for Animal Cruelty Offenders Can Prevent Future Violence, 21 Scholar: St. Mary's L. Rev. on Race & Soc. Just. 167, 170–72 (2019) (describing the link between animal cruelty and mental illness).

[133] See Alder, supra note 40.

amendment cycle since 2018.[134] In conjunction with that notice, the Commission outlined a set of thirteen "proposed priorities."[135] Those priorities included, among others, the resolution of circuit splits, the consideration of amendments that would prohibit the use of acquitted conduct in applying the Guidelines, and the implementation of a multi-year study of pre-trial diversion programs.[136] However, an amendment addressing the animal crushing offense loophole was notably absent.

But hope is not lost. The Sentencing Commission will begin a new amendment cycle in late spring 2023, and those who seek to rectify the animal crushing offense loophole have an opportunity to make policymakers aware of the problem. The Commission must take action to rectify the current lack of guidance on how to sentence an animal crushing defendant. Animal crushing prosecutions are becoming more common—every prosecution under § 48(a)(1) has occurred within the last two years.[137] As prosecutors continue to charge § 48(a)(1) offenses, judges will look to the Guidelines and find a framework that never envisioned the very offense for which they are sentencing the defendant. The proposed reforms outlined in this Essay require varying degrees of action on the part of the Commission. Both the Animal Crushing Guideline and the recognition of animal victimhood will require an extensive amendment process. In the meantime, however, courts can consider the factors listed *infra* when imposing a sentence in an animal crushing case. But until the Commission acts to close the animal crushing offense loophole, the Guidelines will continue to under-acknowledge the severity of the most deplorable forms of animal cruelty.

[134] Federal Register Notice of Proposed 2022–2023 Priorities, U.S. Sent'g Comm'n, https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-proposed-2022-2023-priorities [https://perma.cc/634F-B352] (last accessed on Apr. 23, 2023).

[135] Id.

[136] Id.

[137] See Position of the United States with Respect to Sentencing at 14, United States v. Kamran, No. 22-cr-20 (E.D. Va. July 21, 2022), ECF No. 25.