

Are Dogfight Videos Protected by the First Amendment?

by Thomas E. Baker

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ISSUE

Is a federal statute that makes it illegal to create, sell, or possess depictions of animal cruelty unconstitutional on its face?

FACTS

In 1999, Congress enacted 18 U.S.C. § 48: “Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both.” The statute defines “depiction of animal cruelty” to mean “any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed,

mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place.” This case was the first criminal prosecution and appeal under the statute.

Defendant-respondent, Robert J. Stevens, operates a business out of his home in Virginia called “Dogs of Velvet and Steel.” As part of this business, he runs a Web site (<http://pitbulllife.com>) that specializes in the pitbull breed of dogs. He also advertised in underground dog-fighting magazines. He sold law enforcement agents several videos through the mail and they executed a search warrant to seize other similar materials from his home.

In March 2004, Stevens was indicted and charged with three counts of violating the statute for selling three videos to undercover federal and Pennsylvania law enforcement agents. The first two tapes, entitled *Pick-A-Winna* and *Japan Pit Fights*, included footage from the 1960s and 1970s of organized dogfights that occurred in the United States and

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UNITED STATES V. STEVENS
DOCKET NO. 08-769

ARGUMENT DATE:
OCTOBER 6, 2009
FROM: THE THIRD CIRCUIT

Case at a Glance

In 1999, Congress made it a federal crime to create, sell, or possess depictions of “animal cruelty.” In the first prosecution under the statute, the defendant-respondent was convicted of selling pitbull dogfight videos on his Internet site and sentenced to three years in prison. However, the U.S. Court of Appeals for the Third Circuit invalidated the statute under the First Amendment. The U.S. government is asking the Supreme Court to reinstate the conviction and to rule that depictions of animal cruelty are not constitutionally protected speech.



involved pitbulls, as well as more recent footage of dogfights, also involving pitbulls, from Japan. The third video, entitled *Catch Dogs*, shows footage of hunting parties using pitbulls to hunt and kill wild boars, as well as footage of pitbulls being trained to catch and subdue hogs and boars. All three of these graphic videos included introductions, narrations, and commentary by Stevens, but he did not take any role whatsoever in the actual dogfights depicted in the videos. He merely compiled the videos and sold them.

At the January 2005 trial, the defense and prosecution staged an expert witness fight over the content and value of the three films. According to the prosecution's experts, the videos celebrated and encouraged animal cruelty. According to the defense experts, the videos were simply paeans to the nobility and character of the pit-bull breed. Under the statute's exceptions clause, the jury was instructed that in order to convict the defendant it must find that each film, taken as a whole, had no "serious religious, political, scientific, educational, journalistic, historical, or artistic value." 18 U.S.C. § 48(b). The jury concluded that there was no serious First Amendment value to the videos and consequently returned a guilty verdict on each count. The district court sentenced Stevens to 37 months imprisonment and three years of supervised release.

Sitting *en banc* and dividing 10 to 3, the U.S. Court of Appeals for the Third Circuit set aside the conviction after concluding that the videos were protected speech under the First Amendment and ruling that the federal statute was unconstitutional. Judge Smith's majority opinion should be complimented for its straightforward analysis and overall

accessibility to a nonlawyer reader. Likewise, Judge Cowen's dissent tracks the organization and arguments in the majority opinion to reach the opposite conclusion under the precedents. *United States v. Stevens*, 533 F.3d 218 (3d Cir. 2008) (en banc).

Finally, an unrelated civil lawsuit was filed in 2007 in Miami, Florida, that challenged 18 U.S.C. § 48 on behalf of a company that broadcasted cockfights on the Internet from Puerto Rico, where cockfighting is legal. But the lawsuit was dismissed when the company went out of business. Adam Liptak, "First Amendment Claim in Cockfight Suit," *New York Times*, July 11, 2007, at A13; David Oscar Marcus, Southern District of Florida Blog, July 18, 2008, http://sdfla.blogspot.com/2008_07_01_archive.html.

CASE ANALYSIS

In the press and among First Amendment scholars and lawyers, pornography and obscenity on the Internet get all the attention. Another "Internet phenomenon" has largely escaped notice, namely the dramatically increased availability of "extremely violent images and videos." Michael Reynolds, note, *Depictions of the Pig Roast: Restricting Violent Speech Without Burning the House*, 82 S. Cal. L. Rev. 341, 341 (2009). This case promises to change that. Indeed, it has attracted national attention from the media and bloggers to the problem of Internet violence and triggered a debate over what the government can do to address the problem in a constitutional manner. See, e.g., Robert Barnes, "Court to Weigh Legality of Animal Abuse Videos," *Washington Post*, April 21, 2009; at A3; Julie China, *Animal Law Headlines*, 55 Fed. Law. 4 (2008); Adam Liptak, "Animal Cruelty Law Tests Free Speech," *New York Times*, Jan. 6, 2009, at

A12; David G. Savage, "Animal Cruelty Law Is Rejected," *Los Angeles Times*, July 19, 2008, at A8; Eugene Volokh, "Third Circuit Rejects Proposed New 'Depiction of Animal Cruelty' First Amendment Exception," July 18, 2008, <http://volokh.com>; *Recent Case: Constitutional Law—First Amendment—En Banc Third Circuit Strikes Down Federal Statute Prohibiting the Interstate Sale of Depictions of Animal Cruelty*, 122 Harv. L. Rev. 1239 (2009).

The statute involved in this case has an interesting history. Congress enacted this particular measure to outlaw so-called crush videos. These fetish films depict close-ups of "women inflicting torture [on young animals, e.g., hamsters, puppies, and kittens] with their bare feet or while wearing high-heeled shoes. In some video depictions, the woman's voice can be heard talking to the animals in a kind of dominatrix patter. The cries and squeals of the animals, obviously in great pain, can also be heard in the videos." H.R. Rep. No. 106-397 (1999). Testimony presented at a congressional hearing on the bill, and referenced in the House Committee Report, indicates that "these depictions often appeal to persons with a very specific sexual fetish who find them sexually arousing or otherwise exciting" and notes that they are "commonly available through the Internet." As written, however, the statute did not exclusively cover these "paraphilia" films. Rather, implicitly relying on its Commerce Clause and Necessary and Proper Clause powers, U.S. Const. art. I, § 8, cls. 3 & 18, Congress proclaimed a more general federal interest in "regulating the treatment of animals." The legislative logic was that the law would regulate the "humane care and treatment of animals" and generally discourage individuals from becom-

ing desensitized to animal violence and, at least for some particular individuals, deter their violent tendencies from being eventually redirected towards other human beings.

Of course, Congress cannot exercise one of its limited and enumerated constitutional powers in a manner that violates the thou-shalt-not commandment of the First Amendment: “Congress shall make no law ... abridging the freedom of speech.” U.S. Const. amend. I. And so, as Holmes—the detective, not the justice—might have announced, “the constitutional game is afoot.”

It has long been settled as a matter of constitutional law that films and videos are governed by the First Amendment. In *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952), the Supreme Court explained:

[M]otion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. ... That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures. ... For the foregoing reasons, we conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments.

See also *Winters v. New York*, 333 U.S. 507 (1948) (invalidating a state law for vagueness that defined obscenity as publications “principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime”).

A little metatheory comes in handy here. John Paul Stevens—the justice—once explained the controlling idea in an important article, *The Freedom of Speech*, 102 Yale L.J. 1293, 1993. The Free Speech Clause protects “the freedom of speech”; it does not protect all “speech.” Otherwise, crimes like perjury, bribery, and blackmail that consist of speech would be immune from criminal prosecution. “[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

The metatheory of the First Amendment constructed by the justices on the Supreme Court thus has been and continues to be “categorical.” That is, some categories of speech are protected and some categories of speech are not protected by the First Amendment, or the justices. Among the protected categories of speech, some are more protected than others, but that aspect of the theory is not so much in play in this case.

Existing categories of speech that have been determined to be unprotected include fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); threats, *Watts v. United States*, 394 U.S. 705 (1969); speech that incites imminent illegal activity, *Brandenburg v. Ohio*, 395 U.S. 444 (1969); obscenity, *Miller v.*

California, 413 U.S. 15 (1973); and child pornography, *New York v. Ferber*, 458 U.S. 747 (1982).

The Solicitor General (SG), who is responsible for defending the federal statute in the Supreme Court, must admit that § 48 does not strictly fit under any of these existing categories of unprotected speech. But that does not stop the SG from arguing that the justices should use this case to construct a new category of unprotected speech: depictions of animal cruelty. (The contemporary rhetorical leitmotif of “torture” appears in the definitions in the statute, throughout the Report of the House of Representatives, and on every other page of the SG’s brief.) In order to prevent the underlying illegal acts of animal cruelty and the attendant harms and debasements of the individuals involved, Congress prohibited the interstate and international commercial trade in those depictions.

The SG points out that the Supreme Court has recognized that some narrow categories of speech lack First Amendment protection, because the speech at stake has little or no expressive value and causes serious societal harms. The SG would have the justices get out their blindfolds and constitutional balances to weigh the value of this speech against its societal costs. She insists that the statutory category does not reach any speech that advances the exposition of ideas, by definition, because the statute explicitly exempts “any depictions that have serious religious, political, scientific, educational, journalistic, historical, or artistic value.” 18 U.S.C. § 48(b). Therefore, the resulting new category of unprotected speech, as defined by the government, includes Congress’s hang-up (crush videos) plus the respondent’s ill-gotten livelihood (dogfighting films). Whatever minimal value there may

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be to such depictions of animal cruelty, the SG argues, is far, far outweighed by the torturous harms caused to the defenseless animals, the dehumanizing effects on the human participants and viewers of the videos, and the resulting unraveling of the moral fabric of society. The SG wants the Supreme Court to conduct a categorical balance to weigh the societal value against the societal harm for the entire category of depictions of animal cruelty, and not balance on a case-by-case or film-by-film basis.

The SG makes the same move in the Supreme Court that the government unsuccessfully made in the Third Circuit en banc court to argue that the category of “depictions of animal cruelty” has many features in common with other categories of unprotected speech that the Supreme Court has constructed, particularly child pornography and obscenity. As is the case with child pornography, the government notes, the acts and conduct underlying these videos—dogfighting—are illegal in all 50 states and the District of Columbia; likewise, there are universal prohibitions on cockfighting and animal cruelty generally. Like obscenity, the government argues, these depictions of animal cruelty are “patently offensive” and appeal “only to the basest instincts.” Brief of Petitioner at 9.

The First Amendment overbreadth doctrine measures the precision of a law. A challenge to a statute “on its face” will succeed if the statute has both permissible (constitutional) and impermissible (unconstitutional) applications and the impermissible applications are objectively substantial and relatively excessive; the statute will punish a substantial amount of protected speech that is way out of proportion to the unprotected speech it punishes. Under this doctrine, a defendant can raise

the vice of overbreadth to challenge the constitutionality of a statute even though the defendant’s own conduct is clearly unprotected and could be constitutionally proscribed by a narrower, more specific statute. See *New York v. Ferber*, 458 U.S. 747 (1982).

The respondent brought just such a substantial overbreadth challenge against § 48. Though the Third Circuit en banc court noted that argument, the majority ostensibly struck down the statute on other First Amendment grounds. 533 F.3d n.16 at 235. In the Supreme Court, the SG argues that § 48 is not substantially overbroad because the statute applies constitutionally to a great deal of material—most notably, crush videos—that are, in the first place, obscene and therefore not protected by the First Amendment. Furthermore, the SG argues that any worries about hypothetical applications of the statute to protected speech are obviated by the statutory exemption in subsection (b)—followed in the instruction to the jury in this case—to exempt depictions that have any serious religious, political, scientific, educational, journalistic, historical, or artistic value.

Respondent continues to maintain before the Supreme Court that he personally has “long opposed dogfighting” and that in his work and business he “seeks to educate the public about the beneficial uses of Pitbulls” for tracking and hunting and “how to breed, condition, and train this unique animal.” His Supreme Court brief attempts to contextualize the depictions of dogfighting in the videos as law-abiding and positive, i.e., as extolling the virtues and qualities of the breed, advocating only legal hunting and catching, and disapproving illegal dogfighting. He explains that the depictions of dogfighting were

intended to be disapproving through the use of vintage footage of dogfights that took place either in one of the states when dogfighting was legal or in another country where it still is legal. Stevens thus insists that his videos are protected speech under the First Amendment.

Respondent hunkers down with the First Amendment. His brief blasts the congressional censorship of “never-before-regulated” speech based on an *ad hoc* balancing of the “expressive value” of the speech against its “societal costs.” He points out that the First Amendment, rightly understood, is a limit on government power and cannot be a grant of power to engage in such balancing—whether the balancing is being performed by Congress or by the Supreme Court.

Stevens maintains that depictions of the intentional wounding or killing of animals (with examples) are protected speech and such depictions pervade American culture in popular movies (*Conan the Barbarian*), cable television (Animal Planet), the Internet (his own Web site), just to name a few. Implying that the SG suffers from an irony deficiency, he points out that depictions of this kind are relied upon by law enforcement and animal rights groups, documentarians, investigative journalists, and others to support animal rights efforts and to protect animals from the real bad guys. See also Amicus Curiae Brief of First Amendment Lawyers Association passim; Amicus Curiae Brief for the Reporters Committee for Freedom of the Press and Thirteen News Media Organizations at 22-23.

Respondent also argues that § 48 is substantially overbroad, not narrowly tailored, and not the least restrictive means of protecting animals from harm—all First Amendment insider doctrines that call on the



court to compare how much unprotected speech the statute punishes with how much protected speech the statute reaches, in order to guard against punishing or chilling the freedom of speech.

Finally, Stevens concludes that § 48 does not satisfy traditional strict scrutiny analysis under the Free Speech Clause because there is no compelling, overriding government interest that would justify punishing speech about animal cruelty more severely than the conduct of animal cruelty being depicted. Punishing animal cruelty is constitutionally proper. Punishing speech (films and videos) about animal cruelty is constitutionally improper. According to the respondent, the government cannot convincingly argue that “depictions of animal cruelty” are anything like obscenity or child pornography for purposes of the First Amendment.

SIGNIFICANCE

Congress understood that because these animal cruelty videos are produced in secret and marketed on the Internet a ban on their production is difficult to enforce. The laws already on the books against acts of animal cruelty were not effective. Congress was persuaded that the only effective way to prevent the harm to the animals involved and to avoid the dehumanizing influence these videos have on the participants and viewers is to criminalize their distribution. There is also the Jeffrey Dahmer argument. In fact, Congress explicitly relied on the research literature of psychology and psychiatry that “suggests that humans who kill or abuse others often do so as the culmination of a long pattern of abuse, which often begins with the torture and killing of animals.” H.R. Rep. No. 106-397, at 4 (1999). See also *Amicus Curiae Brief for the American Society for the Prevention of Cruelty to*

Animals at 11-19; *Amicus Curiae Brief of a Group of American Law Professors* at 18-34 (describing scientific research and study on the linkage between animal abuse and violence against humans); *Amicus Curiae Brief Florida, Alabama, Arkansas, Arizona, California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Montana, New Hampshire, New Mexico, North Carolina, Ohio, Rhode Island, South Carolina, Texas, Utah, Virginia, and West Virginia* at 12-21 (arguing that animal cruelty fuels itself and other serious crimes). It should be noted, however, that the viewers—not the actual performers—in crush videos are the ones seeking sexual satisfaction, so the better analogy would be the argument that viewing pornography leads the viewers to commit sexual crimes. See H.R. Rep. No. 106-397, at 10-11 (1999) (dissenting views). Otherwise, we should next expect indictments of Jimmy Choo and Manolo Blahnik as accessories before the fact.

In any event, advocates of free speech see it differently. They argue that the statute will suppress significant amounts of valuable speech (although one of their favorite examples seems to be bullfighting). They want to draw the First Amendment line at child pornography to protect children and they seemingly are less concerned about animals. Free speech advocates see this statute as a genuine threat to a considerable amount of otherwise protected speech.

The briefs in this case contain examples of what law professors call “slippery slope” arguments, and the oral argument will likely include similar arguments. See generally Mario J. Rizzo & Douglas Glen Whitman, *The Camel’s Nose Is in*

the Tent: Rules, Theories, and Slippery Slopes, 51 UCLA L. Rev. 539 (2003); Frederick Schauer, *Slippery Slopes*, 99 Harv. L. Rev. 361 (1985); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 Harv. L. Rev. 1026 (2003). This standard form of argument is familiar: If we allow this (whatever “this” is), it will lead to more and more and worse and worse. Common forms in colloquial usage include, “If you give people an inch, they will take a mile,” or “If you let the camel’s nose into the tent, pretty soon the rest of the beast will follow.”

The often overlooked aspect of slippery slope arguments, however, is that the slope of an argument always has two opposite and equally slippery faces. Indeed, slippery slope arguments play out in the present case in opposite directions. On the prosecution side, the argument is that making it a crime to engage in dogfighting is not enough. Unless we criminalize the distribution of dogfight videos, animal cruelty will become a bigger and bigger industry producing worse and worse films, including crush videos, and more and more people will become dehumanized, and some will become so dehumanized that their violence and cruelty will be redirected against other human beings. On the defense side, the slippery slope argument invokes the threat of ever-increasing governmental censorship resulting in less and less protected speech and more and more unprotected speech. Criminalizing respondent’s dogfighting videos sooner or later will lead to a prison sentence for the producers of “shark week” on the Discovery Channel.

Of course, any policymaker, even Congress, can dig in its heels as if to say, “This far and no farther.” The best response to a slippery slope argument in constitutional law is

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the oft-repeated retort of Justice Holmes, “Not so long as this Court sits!” *Panhandle Oil Co. v. State of Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (“The power to tax is not the power to destroy while this Court sits.”). Justices on both sides of this case, if there are justices on both sides of this case, can make this move at oral argument.

Trying to make an analogy to one of the existing categories of unprotected speech does not seem like a promising strategy for a couple of reasons. First, the Third Circuit judges rejected the analogy to child pornography by a vote of 10 to 3. Second, the SG’s brief relies on the existing categories of unprotected speech not so much to argue that depictions of animal cruelty are like obscenity and child pornography but more to argue that the Supreme Court has constructed and defined categories of unprotected speech and the Republic has not fallen. At bottom, the SG’s brief dares the justices to create a new category of unprotected speech. Many of the amicus curiae who support the government in this case gleefully join this chorus.

However, as the Third Circuit observed, “[t]he Supreme Court has not recognized a new category of speech that is unprotected by the First Amendment in [over] twenty-five years.” 533 F.3d at 220. The Third Circuit majority believed that lightning bolt should come from a higher court. *Id.* at 225 (“Without guidance from the Supreme Court, a lower federal court should hesitate before extending [that] logic ... to other types of speech.”). So, if this case turns out to be the occasion for recognizing a new category of unprotected speech, that will be a big deal. Such a holding would open a veritable Pandora’s box out of which might come other categories of unprotected speech, which the justices would disfavor in their bal-

ancing. See *Amicus Curiae Brief of the CATO Institute* at 22-27 (suggesting defamation of religion, racially motivated hate speech, depictions of violence by or against the U.S. military, and depictions of criminal acts).

In the 1980s, the city of Indianapolis enacted an ordinance that attempted to extend the arguments against child pornography to depictions of women as sexual objects and portrayals of women enjoying pain or humiliation in scenarios of degradation, abasement, domination, violation, etc. The U.S. Court of Appeals for the Seventh Circuit had no trouble striking down the ordinance as a blatant violation of the Free Speech Clause and that holding was summarily affirmed by the Supreme Court. *American Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985, Easterbrook, J.), *aff’d* 475 U.S. 1001 (1986). This old, obscure case is not a clear marker for what the current justices will think of the present statute to protect animals from being depicted in cruel predicaments. But it does suggest that judicial sympathies will have evolved considerably, if protecting women was previously not deemed a good enough reason to create a new category of unprotected speech. See *Amicus Curiae Brief for the Association of American Publishers, Inc., the American Booksellers Foundation for Free Expression, the Association of American University Presses, the Comic Book Legal Defense Fund, Entertainment Consumers Association, Entertainment Merchants Association, Film Independent, Freedom to Read Foundation, Independent Book Publishers Association, Independent Filmmakers Project, Independent Film & Television Alliance, The International Documentary Association, the*

National Association of Recording Merchandisers, the National Association of Theater Owners, Inc., and Pen American Center at 20-21 (holding up the Hudnut case as the prevailing First Amendment paradigm).

If the Supreme Court strikes down the statute in this case, Congress might be expected to redraft and reenact a more particular measure that would narrowly regulate paraphilia crush videos. Such a revised antifetish statute, furthermore, would fit neatly within one of the existing categories of unprotected speech, namely obscenity. See *Miller v. California*, 413 U.S. 15 (1973). Such a revised statute, however, would not support the criminal prosecution against respondent. But see *Amicus Curiae Brief of the Humane Society of the United States* at 20-32 (arguing that the unprotected category of obscenity should not be limited to prurient materials and should include violent and offensive materials such as dogfighting videos).

Interestingly, President Clinton, in his 1999 signing statement, proclaimed that his administration would interpret the statute in this case narrowly to apply only to paraphilia films: “So construed, the Act would prohibit the types of depictions, described in the statute’s legislative history, of wanton cruelty to animals designed to appeal to a prurient in sex.” *Statement on Signing Legislation to Establish Federal Criminal Penalties for Commerce in Depiction of Animal Cruelty* (Dec. 9, 1999) reprinted in 1999 U.S. Code & Cong. & Admin. News 324. President Bush’s Department of Justice brought this prosecution against Stevens for selling dogfighting videos, which obviously are violent but not prurient. President Obama’s SG is vigorously defending this broader interpreta-



tion of the statute in the Supreme Court. The statute Congress enacted does justify this broader interpretation in so many words. It will be up to the Supreme Court to determine, once and for all, if the broader interpretation is constitutional.

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