

April 20, 2010

In *United States v. Stevens*, the Supreme Court voted 8-1 to invalidate 18 U.S.C. § 48 as a violation of the First Amendment, affirming an *en banc* decision of the Third Circuit. The law prohibited the commercial creation, sale, or possession of certain depictions of animal cruelty. Justice Samuel Alito dissented from the Court's opinion.

Section 48 was adopted in 1999 to prohibit a rare type of fetish material called "crush videos," which involve women in stilettos, small animals, and unspeakable acts. But the law was never applied for its intended purpose. The first prosecution under the law, in its ten years of existence, was brought against Robert J. Stevens, a sixty-nine-year-old published author and documentary producer with no prior criminal record. His documentaries included footage of dog fighting and wild boar hunting that had been filmed by others, and many of the segments at issue were filmed in Japan, where dog fighting is legal. Stevens did not engage in dog fighting himself, and did not film the dog fights at issue in the case. Nevertheless, he was indicted and convicted in 2004, and was sentenced to 37 months in prison – 14 months longer than convicted dog fighter Michael Vick. The Third Circuit, sitting *en banc*, overturned the conviction, holding the law violates the First Amendment on its face.

### **Categorical Balancing and Unprotected Speech**

The Supreme Court rejected the government's suggestion that depictions of animal cruelty could properly be classified as a new category of unprotected speech, like obscenity, defamation, fraud, or speech that is integral to criminal activity. It found no such exception in the history of First Amendment jurisprudence, and it rejected the government's proposed ad hoc balancing test, that "[w]hether a given category of speech enjoys First Amendment protection depends on a categorical balancing of the value of the speech against its societal costs."

The Court labeled this "free-floating test for First Amendment coverage" to be "startling and dangerous." It explained that "[t]he First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs," and that the Constitution "forcloses any attempt to revise that judgment simply on the basis that *some speech is not worth it.*" (emphasis added). The Court dismissed language the government cited from previous decisions, such as *New York v. Ferber*, 458 U.S. 747 (1982) and *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) as "descriptive," explaining that it did not "set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so

long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor."

Although it foreclosed the recognition of unprotected speech based on the government's argument for "freewheeling authority to declare new categories of speech outside the scope of the First Amendment," it did not rule out the possibility that such categories might be found in some future case. "Maybe there are some categories of speech that have been historically unprotected," the Court noted, "but [they] have not yet been specifically identified or discussed as such in our case law." In short, any new categories would need to be grounded in our nation's history and First Amendment traditions, and not as the product of some jurisprudential test.

### **Overbreadth Analysis**

The Court did not track the Third Circuit's rationale for striking down the law under strict scrutiny, but instead held that it was substantially overbroad. It noted that the government's defense was based on a narrow reading of the statute as applying only to specific depictions of extreme cruelty. But it interpreted § 48 as creating "a criminal prohibition of alarming breadth." The Court explained that the plain language of the statute applied to any depiction in which an animal is wounded or killed where the underlying conduct is illegal in some jurisdiction. Thus, noting that all hunting is prohibited in the District of Columbia, the Court suggested that "§ 48 extends to *any* magazine or video depicting lawful hunting, so long as that depiction is sold within the Nation's Capital." (emphasis in original). It added that "[t]hose seeking to comply with the law thus face a bewildering maze of regulations from at least 56 separate jurisdictions."

Importantly, the Court held that the "exceptions clause" of § 48, which provided that the law does not apply to "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value," did not sufficiently narrow the law for First Amendment purposes. It rejected the government's attempt to read the word "serious" out of the exceptions clause and to claim that even depictions with slight value would be safe from prosecution. Doing so would rewrite the law, according to the Court. More fundamentally, it observed that depictions are protected by the First Amendment even if they fall outside the seven categories of meritorious speech listed in the exceptions clause, and have only "recreational" or "entertainment" value. It explained that serious value cannot be used "as a general precondition to protecting *other* types of speech in the first place." (emphasis in original). After all, "[m]ost of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from government regulation." (emphasis in original).

Simply put, "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." (emphasis in original). It was unimpressed by the government's pledge to apply the statute narrowly, and noted that this very prosecution of an individual who produced videos depicting hunting and dog fighting under a statute that was written to narrowly target so-called "crush videos" was "evidence of the danger of putting faith

in government representations of prosecutorial restraint.” Bottom line, “[w]e would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”

The Court did not rule out the possibility that a narrower, more targeted law might survive constitutional scrutiny. It concluded by stressing that we “need not and do not decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional.”

### **Justice Alito’s Dissent**

As foreshadowed by his questioning at oral argument, Justice Alito dissented from the Court’s opinion. He objected to the Court’s reaching the question of the statute’s facial validity and of applying the overbreadth doctrine. He would have vacated the Third Circuit opinion and remanded the case to determine if the specific videos at issue were constitutionally protected. Justice Alito argued that overbreadth should be applied to invalidate a statute only as a “last resort.”

The dissent disputed the majority’s conclusion that § 48 created a broad prohibition on speech, arguing that state animal cruelty laws would not apply to activities such as hunting or food processing. Justice Alito further maintained that hunting videos would have sufficient value to avoid prosecution under the law. He concluded that the First Amendment does not protect either crush videos or depictions of animal fighting. In particular, he wrote that “[c]rush videos present a highly unusual free speech issue because they are so closely linked with violent criminal conduct.” Justice Alito compared crush videos to child pornography, and found that the same rationale undermined constitutional protection for both categories of expression.