

Animal Welfare vs. Free Speech

MOST PEOPLE ABHOR animal cruelty and would agree that a person inflicting abuse on an animal deserves to be punished. Then, there are those people who are willing to pay to watch that abuse. The U.S. Supreme Court was recently asked to decide whether a law criminalizing depictions of animal cruelty is protected under the Free Speech Clause of the First Amendment to

the U.S. Constitution. The Court's decision was imminent as I wrote this column, and, based on the tough questions the justices asked at oral argument, I did not need to be Carnac the Magnificent to predict the outcome. As predicted, the Court struck down the law on April 20, 2010.

In 1999, Congress passed a law, 18 U.S.C. § 48, that criminalizes the interstate sale of depictions, such as video, 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 of its creation, sale, or possession. The legislative history indicates that the law was passed to suppress the market for crush videos that show women in high heels or bare feet stomping or otherwise torturing small animals to death.

U.S. v. Stevens involved the sale of videos of pit bulls involved in dog fights and attacking other animals. In 2005, Robert J. Stevens was the first person tried and convicted of knowingly selling depictions of animal cruelty in violation of § 48. He was sentenced to 37 months' imprisonment and three years of supervised release.

Stevens appealed the verdict, and, in a 10-3 decision, an en banc Third Circuit Court of Appeals vacated his conviction. *U.S. v. Stevens*, 533 F.3d 218 (3rd Cir. 2008). The court held that § 48, on its face, violates the right to free speech guaranteed by the First Amendment. The court declined the government's request to add a new category of unprotected speech. Noting that it had been more than 25 years since the U.S. Supreme Court had recognized a new category of unprotected speech—that of child pornography in *New York v. Ferber*, 458 U.S. 747 (1982)—Judge D. Brooks Smith wrote in his majority opinion, “Without guidance from the Supreme Court, a lower federal court should hesitate before extending the logic of *Ferber* to other types of speech.” The majority found that the government's interest in protecting animals was not as great as its

interest in protecting children, as in *Ferber*. “Preventing cruelty to animals, although an exceedingly worthy goal, simply does not implicate interests of the same magnitude as protecting children from physical and psychological harm.” Writing for the dissent, Judge Robert E. Cowen stated that the government could criminalize depictions of animal cruelty, because such expression was of de minimis social value.

The U.S. Supreme Court granted certiorari to determine “whether 18 U.S.C. 48 is facially invalid under the Free Speech Clause of the First Amendment.” At oral argument, the justices posed an incredible series of hypothetical questions to the parties regarding videos of bullfighting, stuffing of geese for pâté de foie gras, hunting with a bow and arrow out of season, and a human sacrifice TV channel.

In a strong show of support for traditional First Amendment rights, Chief Justice John G. Roberts Jr., writing for an 8-1 majority, said that the law was “substantially overbroad,” because it could criminalize, for example, a magazine or video depicting hunting in the District of Columbia, where hunting is illegal. *U.S. v. Stevens*, ___ S. Ct. ___, 2010 WL 1540082 (2010). Justice Samuel A. Alito Jr. dissented. He did not think the statute is overly broad, because it does not apply to the majority's “fanciful hypotheticals.” In his opinion, the law does not apply to depictions of acts that happen to be illegal for reasons having nothing to do with the prevention of animal cruelty. Performing a *Ferber* analysis, Justice Alito said that “while protecting children is unquestionably *more* important than protecting animals, the Government also has a compelling interest in preventing the torture depicted in crush videos.” Alito believed that crush videos and depictions of brutal animal fights are not protected by the First Amendment.

Unfortunately, the time is not ripe for a court to recognize a new unprotected category of speech that extends protections to animals, because animals, even beloved pets, are still considered personal property under the law. For example, individuals who keep animals as pets can recover the market value of the animal in a wrongful death claim, but, in general, there is no recovery for lost companionship or emotional damages. *Gluckman v. American Airlines Inc.*, 844 F. Supp. 151 (S.D.N.Y. 1994) (denied damages for intentional infliction of emotional distress and loss of companionship for the loss of pet dog that was negligently stowed in airplane's cargo hold).

Dogs and other pets are not the same as other possessions like a person's cell phone or car, however.

Section Spotlight

MICHAEL R. SKLAIRE

Criminal Law Section

On behalf of the Criminal Law Section, we are honored and appreciative that *The Federal Lawyer* has provided an opportunity for some of our section's members to share their insight and expertise in this issue. As exhibited by the diverse roster of authors, the Criminal Law Section is made up of prosecutors, defense lawyers, compliance lawyers, judges, government attorneys, and military lawyers who practice in federal and military courts. The Criminal Law Section provides an outlet for members to share ideas, review recent case law, and provide a geographic and subject-matter referral network. The section publishes a newsletter several times a year and provides Supreme Court and policy updates to our members on a periodic basis.

We hold an annual CLE conference, which will be incorporated as part of the Federal Bar Association's Annual Conference in New Orleans this year. The section will also sponsor two presentations, one on immigration and worksite enforcement and the other on corporate

fraud in the post-Madoff era. In addition, the Criminal Law Section hosts receptions and organizes programs throughout the year jointly with the local FBA chapters. In the next few months, we are looking to team up with chapters from around the country to host meet-and-greet sessions with the new U.S. attorneys.

The section's board of directors, which meets by telephone monthly and gets together once a year, consists of an assistant U.S. attorney, an assistant federal public defender, a U.S. magistrate judge from the District of Arizona, the federal public defenders for the Eastern District of Virginia and the Eastern District of Louisiana, and several attorneys in private practice. If you would like to learn more about the benefits of being a member of the Criminal Law Section, or if you wish to be more active and join the board, please contact me. **TFL**

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They are living, sentient beings. They are happy to see you when you get home after a long day at the office. They are intelligent and can learn to sit, speak, or catch a Frisbee. They are not children, but that should not be the only measure of who deserves protection. Slowly, courts are starting to recognize man's best friend as a member of the family. *Campbell v. Animal Quarantine Station*, 632 P.2d 1066 (Hawaii 1981) (granted damages for emotional distress for the loss of pet dog that was

left in a hot, unventilated state vehicle). More people are rallying to champion the status of animals. The welfare of animals will never serve a compelling government interest as long as they are not recognized as something more than personal property. That is why, in my opinion, *U.S. v. Stevens* was affirmed. **TFL**

Julie China is a member of The Federal Lawyer's editorial board.

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³*Id.*, Art. III, § 1

⁴The Chief Justice, sworn in on Sept. 29, 2005, has issued five Year-End Reports on the Federal Judiciary during his tenure.

⁵Sept. 24, 2005.

⁶2005 Year-End Report on the Federal Judiciary, Chief Justice John G. Roberts Jr., citing to *Marbury v. Madison*, 5 U.S. 137 (1803).

⁷*Id.*

⁸2006 Year-End Report on the Federal Judiciary, Chief Justice John G. Roberts Jr.

⁹2007 Year End Report on the Federal Judiciary, Chief Justice John G. Roberts Jr.

¹⁰2008 Year-End Report on the Federal Judiciary,

Chief Justice John G. Roberts Jr., citing to Alexander Hamilton, *Federalist No. 78*.

¹¹In 2009, the Chief Justice limited his report to little more than stating that the "courts are operating soundly, and the nation's dedicated federal judges are conscientiously discharging their duties. See, 2009 Year-End Report on the Federal Judiciary, Chief Justice John G. Roberts Jr. Each of the reports also contains several pages of appendices with the statistical breakdowns of the work of the federal courts.

¹²According to the 2006 Year-End Report the average U.S. worker's pay, adjusted for inflation, rose 17.8 percent creating a 41 percent gap between the judiciary and the average U.S. worker.