Coates' Canons Blog: Animal Cruelty: Did U.S. v. Stevens Change the Enforcement Landscape?

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During its last term, the U.S. Supreme Court held in *U.S. v. Stevens* (130 S. Ct. 1577 (April 20, 2010), that a federal animal cruelty statute (18 U.S.C. § 48) was unconstitutional. The law criminalizes the creation, sale, or possession of a "depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce…." The decision turned on a relatively straightforward First Amendment analysis. State and local law enforcement and animal control officials are probably a bit frustrated though because the law represented one of the few times the federal government extended its reach into the animal cruelty arena in any comprehensive manner. Some believed this expanded federal authority would bolster and enhance state and local efforts to police animal cruelty.

State and local governments are typically the first line of defense in adopting and enforcing animal cruelty laws. The federal government's role is typically narrowly defined – for example, federal laws regulate treatment of animals used for research or exhibitions and the use of animals in fighting ventures if the animals traveled across state lines. It is up to the states and local governments to regulate cruelty more comprehensively. In North Carolina, we have relatively robust civil and criminal statutory schemes governing animal cruelty as well as numerous city and county ordinances.

When the federal law addressed in *Stevens* was debated in the late 90's, the discussion focused primarily on "crush videos" – which are basically sexual fetish videos depicting women slowly crushing small animals. While the treatment of the animals is considered cruelty under all of the states' laws, the identity of the person in the video was typically unknown and therefore states struggled with enforcement. Many hoped the federal law would help shut down this commercial activity. North Carolina joined 25 other states in submitting an amicus brief to argue that states need assistance with enforcement related to "those animal cruelty crimes most often depicted, marketed, and sold, such as animal fighting, production of 'crush videos,' and hog-dog rodeos." The brief explained the elusive nature of the participants in these types of activities and argued that a federal law targeting the commercial activity was the right approach.

The language of the federal law, however, goes far beyond "crush videos." It applies to

> "any visual or auditory depiction …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…."

There is an exception that applies to depictions that have "serious religious, political, scientific, educational, journalistic, historical, or artistic value." Taken literally, this statute could arguably be used to prosecute someone for the possession of a hunting magazine in a jurisdiction (such as the District of Columbia) where hunting is illegal even if the hunting depicted in the magazine is done in a state where hunting is legal. In his dissent, Justice Alito takes issue with the hunting hypothetical and concludes that it falls within the exception.

Mr. Stevens was convicted because his business sold videos depicting pit bull attacks and dogfights (he argued that the fights were legal when they were filmed). Mr. Stevens argued that the law was unconstitutional because it ran afoul of the First Amendment's free speech protections. The Supreme Court agreed – it concluded that the law was facially invalid because it was overbroad. The government argued that it would exercise its prosecutorial discretion and only enforce the law in cases of "extreme" cruelty but the Court basically laughed at the argument, stating that it "would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."

The Court also plainly rejected the government's argument that this category of speech (depictions of animal cruelty) should fall outside First Amendment protection, like child pornography. It did, however, leave open the possibility that a

more narrowly drafted law could fall within a “First Amendment Free Zone.” Anticipating that the *Stevens* ruling did in fact leave the door open, the U.S. House of Representatives has already passed H.R. 5566, which would amend 18 U.S.C. § 48 to limit its scope to “crush videos” and related depictions. The legislation attempts to narrowly define the term “animal crush video” to mean any “obscene” depiction, but I suspect that the use of the term “obscenity” in this context will raise even more constitutional red flags. The bill is now pending in the Senate Judiciary Committee.

Even if H.R. 5566 passes in its current form *and* it withstands a free speech challenge, it will authorize federal involvement in yet another relatively small segment of the animal cruelty workload. State and local governments will need to continue to take the lead because many of these cases involve wholly intrastate activities that lack the “hook” to pull in one of the relatively narrow federal cruelty-related laws.

Links

- www.supremecourt.gov/opinions/09pdf/08-769.pdf
- www.law.cornell.edu/uscode/18/usc_sec_18_00000048—-000-.html
- www.nationalaglawcenter.org/assets/crs/94-731.pdf
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