



## Regulating Pornography

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### Headnote Questions

- How are issues of taste and morality tied to the laws regulating pornography, obscenity and indecency?
- How do obscenity, pornography and indecency differ?
- How are federal, state and local governments involved in the legal issue of obscenity?
- How has the Supreme Court defined speech that is obscene and, therefore, not protected by the First Amendment?
- How does the law shield children from inappropriate messages?
- How do old court precedents and new legislation address online pornography?
- How have ratings systems evolved?

Purveyors of sexual messages and speech otherwise deemed socially inappropriate have never lacked audiences or censors. This was true thousands of years ago when cave walls were a primary medium of communication and remains true in the twenty-first century when the Internet had become a top-tier medium for pornography. Societies have been persistent in constraining and punishing speech found to be morally offensive or socially inappropriate. It does not matter whether these messages are carved in stone, written on paper, or measured in bytes.

Even though the U.S. Constitution has given freedom of expression a hallowed place in the First Amendment, restrictions on pornography, indecency and obscenity have grown in fits and starts to become a substantial body of law. These laws, perhaps because they are so closely tied to morality and evolving social mores, are sometimes enforced unevenly and often lack clear, objective rationales and justifications.

Scholars widely agree that all law was originally derived from precepts of morality that condone behavior supporting the peaceful and cooperative survival of society and condemning behaviors inimical to these basic goals. Condemnable behaviors are labeled immoral, evil or bad. Law renders them illegal. Laws regulating sexual expression and offensive messages remain closely tied to morality. This is often reflected in court rulings that espouse rationales grounded in morality and other public policy determinations of what is good or bad for society.

As with other moral judgments, there are greater and lesser evils in this area of law. Legal restrictions and protections vary

accordingly. The most morally offensive categories of communication are those that incite violence and those with sexual content. These are “fighting words” and “obscenity.” They get no First Amendment protection, and legal restrictions and penalties imposed for them can be as rigorous as those imposed on any harmful behavior. Anyone who utters fighting words can be prosecuted. The fighting words concept is loosely defined as speech that is highly likely to provoke an immediate violent response—just as a slap in the face might. Obscenity, like fighting words, is also difficult to define beyond the basic requirement that it include sex-themed speech. U.S. Supreme Court Justice Potter Stewart famously wrote in a 1964 obscenity case, *Jacobellis v. Ohio*, that the Court was “trying to define what may be indefinable.” But, anyone who creates, sells or conveys obscene messages can be convicted of felonies and sentenced to prison. In a highly publicized 2008 case, for example, Paul F. Little, a pornographer known in the business as “Max Hardcore,” was sentenced to nearly four years for distributing obscenity on the Internet and through the mail, according to the *Tampa Tribune* and *Forbes* magazine.

Pornography, which is less sexually offensive than obscenity, gets some First Amendment protection and is in the continuing process of losing some of its moral stigma. This was illustrated to some degree by a federal prosecutor in the Max Hardcore case who, according to *Forbes*, said of the defendant: “What he creates gives mainstream pornography a bad name.”

So-called “mainstream pornography” does not include depictions of children. The inclusion of children in sexual communi-

cation that would be merely pornographic if adults were depicted, often is transformed into obscenity as a matter of law. The Associated Press reported that a man convicted of trafficking in online child pornography was given a thirty-year federal prison sentence in 2014.

American social mores increasingly label depictions of violence as inappropriate when children are the audience. But the level of public opprobrium as expressed in law remains below the reproach against sexual depictions. In response to public pressure, purveyors of music, movies and video games with violent themes have implemented voluntary rating systems, but efforts to raise the level of legal exorciation to match that of sex-themed speech have failed. In the 2011 case *Brown v. Entertainment Merchants Association*, a seven-justice majority of the Supreme Court found a California law unconstitutional, in part, because it sought to impose the same limitations on violent video games that the First Amendment allows for sex-themed speech directed at children.

Increasing moral condemnation of specific types of violence and invasions of privacy have led to the colloquial linking of the suffix "porn" to some socially and politically unacceptable communication behaviors. For example, the term "revenge porn" refers to depictions of intimate situations that are not necessarily overtly sexual, but usually include nudity in an apparently private circumstance. The term "animal crush porn" has been applied to depictions of the killing of small animals, even when there is no overt sexual content. And "war porn" is the generically applied label for videos of graphic violent military or terrorist attacks. The courts have declined to treat these types of communication as pornography, but legal restrictions have been imposed sometimes on other grounds.

The intensely moral nature of sexual communication law may have contributed to its murkiness and dearth of bright-line definitions. Moral judgments are often gut-level determinations that something is wrong or inappropriate. Such conclusions are not necessarily explicable through a clear path of reasoning.

When legal determinations are tied to morality and issues of taste, they lack some of the long-term predictability common in other areas of law. One of the purposes of written law is to provide the public with behavioral guidelines and notice of what is acceptable and what is not. But morality and taste change in response to a wide variety of cultural, political and religious influences. Victorian influences in the United States in the 1890s, for example, condemned the public display of a woman's naked ankle as indecent and scandalous. During the mid-1960s, television broadcasters would not expose the navel of the era's popular female genie character because they were afraid of viewer backlash or a federal fine for indecency. Not until the 1980s did television commercials dare show women in bras for the first time. In the 21st century, television commercials for products to treat male erectile dysfunction became common fare.

## PORNOGRAPHY AND THE LAW

Despite its obscurities, the law of morally offensive expression has a traceable path of development and fundamental legal parameters to guide those who convey or receive such messages. An examination of this body of law must necessarily begin with an explanation of the basic terms: "obscenity," "pornography" and "indecency."

Indecency is the broadest of the three terms and is applied to perhaps the least morally offensive expression. It refers to messages — sexual and non-sexual — that are considered clearly offensive. Indecency does not necessarily have any of the sexual content of obscenity or pornography but is otherwise considered morally offensive or socially inappropriate. It receives substantial First Amendment protection in the print media and online but is subject to legal restriction in the broadcast media. Indecency is often as much a question of taste, morality and social mores as it is an issue of law. It is nonetheless, a routinely used legal term at the heart of federal legal restrictions in the broadcast media and on the Internet. Broadcast stations, for example, are prohibited from transmitting indecent messages during selected hours of the day.

Indecency was also the term used to refer to the word "fuck" when it was used in a non-sexual, but apparently highly offensive epithet: "Fuck the Draft." Paul Cohen was convicted of disturbing the peace in 1968 because he wore a jacket inscribed with those words. The Supreme Court, in *Cohen v. California*, found no sexual meaning in the words as used and reversed the conviction. Justice John Marshall Harlan observed that the message was distasteful to many people but noted that "it is nevertheless often true that one man's vulgarity is another's lyric." Profanity is often a synonym for indecency in that it also can have no sexual meaning but usually is considered vulgar and offensive expression that can be regulated by law in some contexts. The First Amendment protects indecency in print media, movies and the Internet.

"Pornography" is a term used to label sexually explicit expression. It is indistinguishable from what is euphemistically identified as "erotica." "Pornography" is often used as a term of criticism indicating crass sexual expression. While erotica and pornography may be equally sexual, erotica conveys a somewhat literary nuance. "Pornography" generally indicates a decided lack of delicacy. It is not truly a legal term, but "pornography" often is applied to sexual expression that gets some First Amendment protection. "Hardcore pornography" usually means obscenity.

"Obscenity" is a legal term that refers to material that has been deemed illegal by a court. It refers to sexual expression that is disgusting to the senses or abhorrent to morality and to graphic portrayals of sex acts intended to arouse lustful thoughts. The term is often used generically to express disgust or moral outrage in non-sexual contexts; but legally, material

must meet a specific test to be deemed obscene.

Supreme Court rulings on sexual expression and morally inappropriate speech fall into two basic areas. First, the Court interprets federal statutes and regulations that control or prohibit the creation and distribution of sexual expression. This body of law includes the Federal Communications Act, rules and regulations of the Federal Communications Commission and U.S. Postal Service, laws controlling imports and exports, and regulations governing interstate commerce. Obscenity laws, like statutes on almost any subject, contain vague provisions that courts must interpret. For example, if U.S. Customs agents in New York City intercept pornographic films shipped from Germany to New Hampshire, the courts must determine whether to apply the laws and standards of New York, Germany or New Hampshire. If statutes are silent, federal appellate courts must articulate rules of law by relying on other legal precedents.

More importantly, the Supreme Court decides how far federal and state governments may go in restricting sexual expression. The Court indicated in 1931 that obscenity was one of a few, narrow classes of expression that is unprotected by the First Amendment. The ruling in *Near v. Minnesota* provided no guidelines about this narrow class. Twenty-six years later, the Court began the difficult task of drawing the line between sexual expression that was obscene (and therefore subject to government bans and criminal prosecution), and sexual expression that was non-obscene (and protected by the First Amendment).

The creation and enforcement of anti-obscenity laws are primarily left to the states. The Supreme Court has determined that the states retain broad police power to prohibit all behavior deemed inimical to the comfort, safety, health and welfare of society. Police power authorizes states to enact laws to protect the peace, good order, morals and health of their communities.

Congress and federal agencies also have created legal restrictions on obscenity, but state supreme courts and legislatures are the sources of the greatest number of obscenity regulations. Local police and prosecutors handle the enforcement of state obscenity law or sometimes choose not to enforce them for political or practical reasons. Neither the First Amendment nor federal statutes require states to enact obscenity laws. Some state judges have effectively exercised their option to decriminalize the sale of obscenity to adults. And in some metropolitan areas, a liberal political environment and a thriving consumer market for sexual material have discouraged the enforcement of anti-obscenity laws. In 2011, during the administration of President Barack Obama, the U.S. Justice Department's Obscenity Prosecution Task Force was disbanded and had not initiated any such prosecutions since he took office, according to a report in the *Huffington Post*. Some jurisdictions, however, vigorously prosecute obscenity. Anyone prosecuted always has, of course, recourse to the defenses provided by the First Amendment. Some state constitutions and state court rulings provide protection greater than the First Amendment does.

## PORNOGRAPHY AND SOCIETY

Whether pornography is a threat to public safety, health and morality remains in debate. Some claim the creation and sale of pornography are associated with illicit activities such as gambling, prostitution and illegal drugs. But studies also have concluded that businesses that provide sexually explicit imagery, particularly those online, have thrived largely without the accompanying taint of illegal drugs and prostitution.

Sociologists and political activists are divided on whether adult pornography is harmful. Two presidential commissions have studied the issue. President Lyndon Johnson created the Commission on Obscenity and Pornography in 1968. Two years later, during the Richard Nixon Administration, the commission concluded that neither hard-core nor soft-core pornography leads to antisocial behavior and thus should not be prohibited. Eighteen years later, however, U.S. Attorney General Edwin Meese's Commission on Pornography concluded that pornography was pervasive in society and recommended vigorous enforcement of anti-obscenity laws.

Many people, including some social scientists, oppose obscenity laws. They argue that moderate consumption of pornography — like wine, ice cream or even marijuana — is compatible with physical and mental health. Sallie Tisdale, a journalist and social commentator, defended pornography for women in a 1992 *Harper's* magazine article and in a 1994 book. She wrote: "I want never to forget the bell curve of human desire, or that few of us have much say about where on the curve we land."

Proponents of anti-obscenity laws cite history and research findings to defend their position. They point out that many cultures traditionally have controlled sexual expression. The *Bible* may include bawdy tales of prostitutes and adulterers, but it tells these tales discretely without images of genitals. They point to studies finding that men exposed to explicit videos become more calloused toward women and that there is a strong correlation between consumption of sex-themed magazines for heterosexual men and the incidence of sex crimes against women. Two feminists, Catherine MacKinnon and Andrea Dworkin, were particularly active in fighting pornography, which they define as the graphic, sexually explicit subordination of women. They argue that it presents women "as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display." An Indianapolis ordinance adopted this argument, but in a 1984 case, *American Booksellers v. Hudnut*, a federal appeals court found it unconstitutional.

Some federal judges, however, have supported attempts by states to restrict pornography and public nudity, even if they addressed actions by wholly consenting adults. Supreme Court Justice Antonin Scalia, for example, observed in a 1991 case, *Barnes v. Glen Theatre*, that Indiana's nudity law would be violated even "if 60,000 fully consenting adults crowded into the

Hoosier Dome to display their genitals to one another, even if there were not an offended innocent in the crowd." In 2000, the Court in *Erie v. Papp*, upheld a Pennsylvania ordinance that banned public nudity and thus prohibited erotic dancers in bars from performing nude. The Court gave state and local government broad latitude for creating and implementing such laws. Two justices said governments need no justification other than public morality to ban nude dancing in public. And four justices insisted on only the slimmest of justifications for such bans, stating that local government could justify the regulations by citing studies from other states and cities that documented secondary effects of nude, barroom dancing. The cited effects often include sex crimes, prostitution and harm to property values.

### PORNOGRAPHY AND THE SUPREME COURT

Justice Scalia's colorful observation — part of a lively history of Supreme Court jurisprudence in this area — is from a concurring opinion in a case involving nude dancing. Darlene Miller, a dancer at the Kitty Kat Lounge in South Bend, Indiana, argued that nude dancing was a form of protected expression. Indiana, however, said the state had a right to require all public performers at least to wear pasties and G-strings, and the Supreme Court agreed in a decision that is representative of the Court's history in pornography law.

In his majority opinion in *Barnes*, Chief Justice William Rehnquist conceded that nude dancing was indeed "expressive conduct within the outer perimeters of the First Amendment," but insisted that Indiana had a right to combat public nudity. He observed, however, "It is possible to find a kernel of expression in almost every activity a person undertakes." Byron White, joined by three other justices, dissented and argued that non-obscene, nude dancing performed before consenting adults was protected expression. Justice David Souter joined Scalia in his attack on the concept that consent should affect the outcome of the case.

This kind of fragmentation dominated Supreme Court jurisprudence for more than thirty years. In *Manual Enterprises v. Day*, the Court clearly indicated for the first time that gay-themed sexual expression was not in and of itself patently offensive or necessarily obscene. The case arrived at the Supreme Court after the U.S. Postal Service seized and refused to deliver copies of magazines that it judged obscene because they displayed pictures of nude men. A fractured majority allowed the magazines to be delivered but reached that result on a variety of rationales. Two justices found the photographs to be no more patently offensive than those in the *Playboy* and *Esquire* magazines of the time. "[T]hese portrayals of the male nude cannot fairly be regarded as more objectionable than many portrayals of the female nude that society tolerates," Justice Harlan wrote. Three other justices indicated that only a court of law and not postal officials could determine whether expression is obscene.

Justice William O. Douglas futilely claimed the First Amendment protected the magazines even if they were obscene.

Scattered rationales also were provided in the 1966 case *Memoirs v. Massachusetts*, for which Justice William Brennan presented a three-part test to determine whether a work was obscene. The test would find a work obscene if (1) the dominant theme appealed to a prurient interest in sex; (2) it was patently offensive because it affronted contemporary community standards regarding sexual matters; and (3) the material was utterly without redeeming social value. Two justices joined Brennan's plurality decision finding that the 1749 novel *Memoirs of a Woman of Pleasure* — also known as *Fanny Hill* — was not obscene; two justices concurred and voted to overturn the conviction but for other reasons; another judge wrote a separate concurrence; and three justices filed separate, dissenting opinions.

Justice Douglas, who advocated a strict interpretation of the First Amendment, concurred in the judgment. The First Amendment absolutely protected obscene speech, he wrote: "Publications and utterances were made immune from majoritarian control by the First Amendment, applicable to the States by reason of the Fourteenth. No exceptions were made, not even for obscenity."

The *Memoirs* ruling produced a definition of obscenity that was an expansion of the definition the Court developed in the 1957 case *Roth v. United States*. The newer ruling made it hard to prosecute sex-themed works because it required a finding that works were "utterly without redeeming social value." Most films or books contain a kernel of a story line or smidgen of non-sexual plotting that amount to some social value. Pornographers took pains to make sure this was so to assure First Amendment protections for their work.

The social value test was suggested in *Roth* and formally adopted in *Memoirs*. Under the combined *Roth/Memoirs* test, other appellate courts found most sex-themed materials to be non-obscene and thus protected by the Constitution. Adult bookstores and theaters proliferated from the late 1960s through the 1980s, two presidential commissions studied pornography, and the Supreme Court generally ruled in favor of free speech in obscenity cases. Justices, however, were divided on how to define obscenity and whether they should be spending so much time perusing sexual expression. For example:

- In 1964, the Court invalidated a \$2,500 fine levied against a Cleveland Heights theater manager who was convicted of obscenity charges for showing *Les Amants*, a French film about an unfaithful wife. It was in this case that Justice Stewart conceded that he could not intelligibly improve on the legal definition of obscenity, "But I know it when I see it, and the motion picture involved in this case is not that."
- In a 1966 case, *Mishkin v. New York*, Justice Hugo Black objected to "saddling this Court with the irksome and inevitably unpopular and unwholesome task of finally deciding by a case-by-case, sight-by-sight personal judgment of the members

of this Court what pornography (whatever that means) is too hard core for people to see or read."

- In a 1967 case, *Redrup v. New York*, the Court reversed obscenity convictions from New York, Kentucky and Arkansas for distribution of the publications *High Heels*, *Gent*, *Swank*, *Lust Pool* and *Shame Agent* magazines. Justices disagreed on what rule of law to apply, but deemed the material protected "whichever of these constitutional views is brought to bear."
- In 1968, Justice Harlan noted in *Interstate Circuit v. Dallas* that the Court had published fifty-five separate opinions for 130 obscenity cases since *Roth*, creating a "chaotic state of affairs" that was "unmatched in any other course of constitutional adjudication." Harlan concluded: "[A]nyone who undertakes to examine the Court's decisions since *Roth* which have held particular material obscene or not obscene would find himself in utter bewilderment."
- In 1970, Chief Justice Warren Burger complained in the *Walker v. Ohio* decision about assuming the role of a "supreme and unreviewable board of censorship for the 50 states."

The struggles the Court had in defining and regulating obscenity were mirrored throughout the judicial system. Some scholars, attorneys and judges joined Justices Black and Douglas in opposition to all obscenity laws, but most jurists and observers agreed that the task was unavoidable. Indeed, many so-called absolutists who insist that consenting adults have a right to view whatever they desire, agree that lines must be drawn for material aimed at children or that is obtrusive and unavoidable, such as billboards in public spaces.

If limits must be imposed for materials that are available to children, the central question becomes, "Where are those lines drawn?" In 1973, in *Miller v. California*, the fragmentation on the Supreme Court abated when five justices, for the first time since *Roth*, agreed where some lines should be set. The decision established the basic legal definition of obscenity applied into the twenty-first century.

### **MILLER V. CALIFORNIA**

Marvin Miller sent a mass mailing to California residents promoting four illustrated books (*Intercourse*, *Sex Orgies Illustrated*, *Man-Woman* and *An Illustrated History of Pornography*) and a film (*Marital Intercourse*). A restaurant owner and his mother in Newport Beach who received copies of the brochure complained to police. Miller was eventually charged with violating California's obscenity statute.

The Supreme Court described the brochure as consisting primarily of "pictures and drawings very explicitly depicting men and women in groups of two or more engaged in a variety of sexual activities, with genitals often prominently displayed." Five justices, in an opinion written by Chief Justice Burger,

found the brochure obscene under the Court's new definition:

- (1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;
- (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law;
- (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The first two parts of the *Miller* test were quite similar to the first two parts of the *Memoirs* test. In part three, however, the Court rejected the requirement that a work be utterly without redeeming social value and replaced it with the more restrictive requirement that the work lack serious value as determined by the "average person." In addition, the *Memoirs* definition had used the broad adjective "social" to qualify value; the *Miller* test specified that the value be literary, artistic, political or scientific, omitting, for example, entertainment value. The *Miller* test was a significant alteration of the third part of the *Roth/Memoirs* test by setting aside the implied social or moral expertise of an average person for the actual expertise of a "reasonable person" in areas such as the arts and sciences. The actual expertise requirement was made explicit by the Court's *Pope v. Illinois* ruling in 1987.

On the same day that the Court decided *Miller*, it decided four other obscenity cases, all by 5-4 votes, clarifying a variety of constitutional provisions in obscenity law. In *Kaplan v. California*, the Court ruled that it is not necessary for a work to use images to be obscene. Words by themselves can be sufficient. In *Paris Adult Theatre I v. Slaton*, the Court confirmed that adult movies could be found obscene, even when they were marketed discreetly. The fact that the theater had a tasteful, non-exploitative exterior and that it restricted its clients to interested adults did not exempt it from obscenity prosecution.

Finally, the Court upheld two federal prosecutions for importing obscene material into the United States for private, personal use and for the transportation of obscene material in common carriers in interstate commerce.

### **Miller Part 1: The Prurient Interest Test**

The first prong of the *Miller* test — "Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to prurient interest" — is the easiest to satisfy. It requires that sexual expression be judged according to average persons — not particularly susceptible and sensitive persons or totally insensitive persons. And the work is judged according to local, contemporary standards, which may vary from community to community. Wrote the *Miller* majority: "It is neither realistic nor constitutionally sound to

read the First Amendment as requiring the people of Maine or Mississippi to accept public depiction of conduct found tolerable in Las Vegas or New York City.... People in different states vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity."

The first part of the *Miller* test requires that the overall work have a prurient appeal, that is, the work arouses an immoderate or unwholesome interest in sex. The work, however, is judged on its entirety, not on isolated or fleeting passages or scenes that contain sexual descriptions or images. When a Cincinnati art museum was prosecuted for exhibiting photographs by Robert Mapplethorpe, the judge required the 175-photo exhibit to be judged on the basis of seven controversial photos that had been isolated from the others in the exhibit, violating the intent of the *Miller* test.

### **Miller Part 2: The Patent Offensiveness Test**

The second prong of the *Miller* test is "Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law."

A federal judge who found that *Penthouse* appealed to a prurient interest in sex also found that it satisfied the second part of the *Miller* test: The sexual portrayal was sufficiently graphic to be considered patently offensive. Ordinary photographs or drawings of nudes would not satisfy such a requirement, but the 108 photographs in the five photo features went beyond nudity. The judge noted that eighty-seven photos included exposed breasts, buttocks or genitals; nine included actual or simulated lesbian, oral sex; seven alluded to masturbation through the location of fingers in or near genitals; and sixteen photos showed legs spread to expose genitals, with six "close-up photographs showing nothing but women's groins."

The patent offensiveness requirement separates hardcore sexual portrayals from other sexual expression. For a sexual portrayal to be obscene, it must be specifically enumerated in a state obscenity statute. In *Miller*, the Court said such portrayals were of ultimate sexual acts, normal or perverted, actual or simulated, including masturbation, excretory functions and the lewd exhibition of genitals. State statutes that define the behaviors whose portrayals may be obscene read like a catalog of sexual practices for heterosexual and homosexual couples and individuals. A Virginia statute, for example, said obscene material contains content that appeals to "a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse."

Thus, communities must restrict prosecutions to works containing explicit portrayals of hard-core sex acts. One year after *Miller*, the city of Albany, Georgia, fined theater manager Billy Jenkins \$750 and sentenced him to twelve months of probation for showing the movie *Carnal Knowledge*. Some critics listed the film as among the ten best movies of 1971, and mainstream

movie star Ann-Margret received an Academy Award nomination for her performance. The Supreme Court, in *Jenkins v. Georgia*, reversed the conviction and pointed out that juries do not have "unbridled discretion in determining what is 'patently offensive.'" Sexuality may have been the major theme of the movie, the Court said, but it was not obscene: "There is no exhibition whatever of the actors' genitals, lewd or otherwise, during these scenes. There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the *Miller* standard." The case is a strong reminder to those individuals who mistakenly believe that *Miller* gave communities unlimited power to regulate erotic material.

Subjectivity, imprecision and unpredictability occur in all three parts of the *Miller* test. Complicating this subjectivity, tolerance for sexual-themed materials varies from community to community. The concepts of patently offensive and prurient interest vary according to community norms, which the law apparently assumes are reflected in the attitudes of jurors.

### **Miller Part 3: The Serious Value Test**

The third and final determinant of obscenity is "Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value." Even if a work appeals to the prurient interest and is patently offensive under state law, it must satisfy the third part of the *Miller* test to be obscene and to lie outside the protection of the First Amendment. In effect, the third part forces judges into roles of artistic or social critics and evaluate the aesthetic merit of works containing sexual content. Prosecuting and defense attorneys may call expert witnesses to characterize the social value of the work for the jury.

The presence of a substantial amount of serious, non-sexual material may salvage a work that contains graphic sex, but the amount of non-sexual material must be substantial. One judge has cautioned: "A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication." Although some judges have classified *Penthouse* magazine as obscene because of the quantity of explicit, erotic photographs, others have judged it non-obscene because of its serious articles. The Louisiana Supreme Court in 1980 found that the 228-page, June 1980 issue of *Penthouse* satisfied the first two parts of *Miller*, and that ninety-six pages of photo essays of women satisfied the third part because they constituted hardcore sexual conduct. However, the magazine as a whole was deemed by sixty-seven pages of articles that had serious value.

Similarly, in 1979, a Boston Municipal Court judge upheld First Amendment protection for the film *Caligula* by a legal thread. A political scientist testified that the film had a serious political theme about absolute power corrupting absolutely, and no witness rebutted the point. The judge ruled that the movie was protected because the government had failed to prove that the film lacked serious political value.

## The Transition of the Obscenity Test

### The Rationale:

" [I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."

### Prurient Interest:

**Roth (1957):** The average person, applying contemporary community standards must find that the dominant theme of the material, taken as a whole, appeals to the prurient interest.

**Roth-Memoirs (1966):** The dominant theme of the material, taken as a whole, must appeal to the prurient interest in sex.

**Miller (1973):** An average person, applying contemporary, local community standards, must find that the work, taken as a whole, appeals to the prurient interest.

### Patent Offensiveness:

**Roth (1957):** The material is patently offensive because it affronts contemporary community standards.

**Miller (1973):** The work depicts in a patently offensive way sexual conduct specifically defined by applicable state law.

### Value of the Work:

**Roth (1957):** The material is utterly without redeeming social value.

**Miller (1973):** The work lacks serious literary, artistic, political or scientific value.

Judges are not free to serve as their own fact finders on the issue of social value. A federal district court judge found the hip-hop lyrics of the 2 Live Crew album *As Nasty As They Wanna Be* obscene; but he ignored the testimony of critics that the music had political significance and literary conventions, and the government presented no evidence on the issue of artistic value. The Eleventh U.S. Court of Appeals reversed the ruling, rejecting the argument that "simply by listening to this musical work, the judge could determine that it had no serious artistic value."

A federal district judge determined in 1991 that a modicum of political or literary value can salvage a work. The judge ruled that a truck driver's bumper sticker, "How's my driving? Call 1-800-EAT-SHIT," had serious literary value because it parodied bumper stickers that encouraged drivers to call truck companies with comments about the driving habits of truck drivers. The judge also said the bumper sticker had serious political value

because it protested the "Big Brother" mentality that is promoted by serious versions of the sticker, and it did not satisfy the first two parts of *Miller* because it was not erotic.

Other judges have not been so quick to find redeeming serious value in sexually explicit material. In 1977, the Kentucky Supreme Court upheld an obscenity conviction and accompanying \$4,000 fine against the Paducah Fourth Street Cinema for showing the now iconic pornographic movie *Deep Throat*. After viewing the movie, the court held that it lacked serious value: "The story line consists entirely of the sexual activities of Miss Linda Lovelace. We failed to find any serious literary, artistic, political or scientific value in this motion picture." A federal district court, four years later, similarly failed to find serious value in the film *Cinderella-96*, which was described as a translation of the fictional character, Cinderella, into a bawdy, lusty tale of recurring homosexual and heterosexual encounters. The judge said the "sum and substance of the movie is the almost unbroken string of sexual acts depicted." He concluded that the movie was obscene even though it contained no sexual penetration or ejaculation. And he said it lacked serious literary and artistic value even though it may be entertaining and enjoyable to some viewers.

## OBSCENITY AND PUBLIC OPINION

After *Miller v. California* became the binding precedent, obscenity convictions decreased and more sexual materials became available. This may be because the public doesn't want obscenity laws to be strictly enforced. Some prosecutors and judges — those people responsible for enforcing obscenity law — are elected, and members of the public serve on the juries that decide criminal obscenity cases. Studies show that many people use erotica or tolerate its use by others. A 1994 study by University of Chicago Professor Robert T. Michael, for example, reported that 41 percent of men and 16 percent of women questioned said they had purchased auto-erotic materials during the previous twelve months. Twenty-three percent of the men had watched sexually explicit movies, 22 percent had visited clubs with erotic dancers, and 16 percent had purchased sexually explicit books or magazines. Only 34 percent of all subjects said they believed there should be laws prohibiting the sale of pornography to adults.

A 2015 report on a Gallup Poll indicated that 43 percent of Americans had come to believe that pornography is "morally acceptable." This was the highest level of acceptability since polling on the topic began in 2011. The acceptance rate among women, however, was 25 percent.

Other studies report similar results. A 1990 Kinsey Institute survey found that 54 percent of adults questioned had watched adult videos or movies at least once. A 1991 Gallup Poll found that 53 percent of adults either opposed tightening standards in their communities for the sale of sexually explicit material or

wanted the standards to be less restrictive. In addition, more than 50 percent of adults said magazines with nudity or that show adults having sexual relations, theaters showing adult movies and sexually explicit video rentals should be available to adults without restrictions or without public displays. Tolerance has increased in the years since the study.

The proliferation of sex-themed magazines, increased explicitness of some major magazines, and growing availability of DVDs and online sex videos are developments that reflect a public that consumes more sex-themed material and is increasingly tolerant of it. This is a public that balks at obscenity prosecutions. Law professor Robert Riggs counted the number of obscenity cases appealed to higher courts before and after *Miller* and found a sharp upward trend from 1969 to 1974, the year after the decision, and an "almost equally sharp down turn" after 1974. Political scientist Harold Leventhal detected similar trends when he surveyed local prosecuting attorneys about obscenity enforcement before and after *Miller*. Although prosecutors reported an increase in the quantity of obscenity in their communities after 1973, they reported a lower priority for prosecuting obscenity and a drop in the number of obscenity cases. Leventhal concluded that *Miller* failed to spur more obscenity prosecutions. Similarly, former University of Chicago law professor Cass Sunstein observed in 1993 that "realistically speaking, most people involved in the production of sexually explicit work have little to fear from the Miller test."

So, while the three-part *Miller* test and the wording of some local obscenity statutes theoretically have made it easier to prosecute obscenity, the public has grown increasingly tolerant of sexual expression and has reduced political pressures on elected officials to enforce obscenity laws. And some members of that public have difficulty when they serve as jurors and are asked to restrict magazines or films that are similar to materials that the jurors may have rented or purchased themselves.

### THE SCANT PROTECTION OF OBSCENITY

*Miller* and its companion cases were aimed at restricting the transportation and sale of explicit sexual expression, but what of the possession of sexually explicit material? Coexisting with the doctrine that obscenity may be regulated is a second doctrine at the core of which is the concept that when people are in the privacy of their homes, the government may not interfere with their personal thought process or their perusal of words or pictures. Under this doctrine, the private possession of objectionable material is legal in nearly every case.

Justice Thurgood Marshall, in *Stanley v. Georgia*, a 1969 case, articulated this concept that the mere possession of obscenity for private use is generally beyond the reach of government. When police searched the home of Robert Eli Stanley for bookmaking equipment, they found no gambling devices but discovered three reels of sexually explicit 8mm film.

In his majority opinion overturning Stanley's conviction, Justice Marshall found that the mere private possession of obscene matter could not be a crime under the Constitution. The state has no right "to control the moral content of a person's thoughts," he wrote, and the right to receive information and ideas is critical. Wrote Marshall: "If the First Amendment means anything, it means that a state has no business telling a man, sitting alone in his own home, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."

Stanley was as much a victory for home sanctity as for free expression. The reach of the Stanley ruling, however, was substantially diminished in subsequent cases. Perhaps most notably in 1990 when the Court found the possession of child pornography, even at home, was subject to criminal prosecution. This ruling in *Osborne v. Ohio* reemphasized the Court's finding of a compelling government interest in protecting child victims of pornography as elaborated in *New York v. Ferber*.

State legislatures and supreme courts have minimized obscenity prosecutions. But it is difficult for state legislators to get elected on a platform of decriminalizing obscenity. In 1990, a federal district court judge in Florida told opponents of obscenity laws: "In sum, if persons subscribe to the view that obscenity should be legalized, they should take their petitions to Tallahassee, the Florida capital, not to the steps of the U.S. courthouse." But most state legislatures have been unsympathetic.

Most actions to abolish obscenity laws come from state supreme courts, which are more independent of voters than legislatures are. The most dramatic example is the Oregon case *State v. Henry*. In 1987, the Oregon Supreme Court voted unanimously to decriminalize the sale or ownership of obscenity for adults, though sale of sexually explicit material to minors remained illegal. The court reversed the conviction of Earl Henry, the operator of an adult bookstore in Redmond, ruling that the state constitution's free-expression clause was broader than the First Amendment and protected obscenity. The court reasoned that territorial law existing in 1857, when the constitution was adopted, prohibited only the distribution of obscenity to minors. The court concluded: "In this state any person can write, print, read, say, or sell anything to a consenting adult even though the expression may be generally or universally considered 'obscene.'"

Obscenity protection made other inroads in western states. The Hawaii Supreme Court ruled that the right of privacy, which had been incorporated in its state constitution nine years earlier, protected adult possession of obscenity. The court indicated in a footnote that it was not deciding the issue of child pornography, the sale to minors, the obtrusive public display of pornography, the showing of obscenity to a captive audience, or films that depicted actual killings.

## PROTECTING CHILDREN AND JUVENILES

Even when obscenity is decriminalized for consenting adults, courts recognize the need to restrict sexually explicit material from view by juveniles and children. The exception has two manifestations. First, federal and state laws prohibit the sale of sexual materials to minors. Second, federal and state law prohibit the distribution of materials portraying children or juveniles in sexually explicit situations whether in the physical communication media or online.

### *Variable Obscenity*

State and federal laws don't merely ban the sale and virtual transmission of legally obscene materials to minors; they also ban the sale and virtual transmission of sexual materials that would be legal if sold to adults. This approach to regulating material has been called "variable obscenity." The government may be stricter in prohibiting the dissemination of sexual materials to juveniles than to adults.

In a 1968 case, *Ginsberg v. New York*, the Supreme Court upheld a New York statute that made it a crime to sell materials containing nudity to anyone under the age of 16. Sam Ginsberg, the owner of a Bellmore, Long Island, luncheonette, sold two sex-themed magazines to a 16-year-old boy on two occasions. The magazines contained pictures of nude women that were clearly not obscene. The Court upheld the conviction and denied that the statute lacked a rational justification, even though studies neither proved nor disproved a causal link between sex-themed material and the ethical and moral development of youths.

Events decades later demonstrated that the doctrine of variable obscenity remains alive. In 1996, a panel of the U.S. Court of Appeals for the Ninth Circuit upheld a California statute banning the sale of sexually oriented publications from unsupervised news racks. The court held that the California legislature had a compelling interest in shielding juveniles from sexual material that was not obscene for adults. The next year, Phoenix police used a similar Arizona statute to justify seizure of 15 coin-operated news racks for a local, sexually oriented weekly, *Beat*, which had been published for 33 years and had a circulation of 8,500. The publisher, Jerry Evenson, commented: "We're not pornographic. We have no full nudity, there is no profanity. The only thing we have is bare nipples."

The Federal Communications Commission has applied the same logic in prohibiting the use of indecent language on commercial radio. The Supreme Court, in *FCC v. Pacifica*, has said radio may be restricted more than print media because of its intrusiveness and its accessibility to children. The case began when WBAI broadcast a twelve-minute monologue by George Carlin, "Filthy Words," at 2 p.m. His satire was an analysis of the seven words — crude references to sex, excrement, body

parts, and so forth — that were banned from broadcasting. Although the station preceded the monologue with an advisory that it contained offensive language, a man who was driving with his young son missed the advisory and tuned in to the middle of the monologue. He complained to the FCC.

The Supreme Court voted 5-4 to uphold possible civil sanctions against the station, but its decision was based on the fact that radio is uniquely available to children. The majority said the decision balanced the significant interests of listeners in their homes against broadcasters' interests. A concurring opinion indicated that the ruling did not apply to the isolated use of an offensive word in a broadcast. Eleven years later, in 1989, the Court underscored the importance of the intrusiveness factor and invalidated a ban on telephone indecency. The FCC was attempting to control the dial-a-porn business that made sexually oriented telephone messages available to people who paid for calls that began with the numbers 900. The Court indicated that the telephone was not nearly as intrusive as the radio: "Placing a telephone call is not the same as tuning in a radio and being taken by surprise by an indecent message."

From 1989 to 1993, while Alfred Sikes was FCC chairman, the commission actively enforced radio's prohibition against indecency and levied fines ranging from \$2,000 to \$600,000. Most notorious was radio shock-jock Howard Stern, who paid a total of \$1.7 million in fines for his off-color morning commentaries. He was cited for his numerous and explicit references to masturbation, fornication, excretory functions and sexual organs. A study of broadcast indecency fines for 1987-1997 found that the FCC tended to fine stations "when humor is combined with patently offensive descriptions of sexual or excretory activities or organs, expletives, or sexual innuendo." This was precisely Stern's core product. Stern eventually fled the FCC's jurisdiction and settled into a lucrative career in satellite radio in 2005.

In 2001, the FCC attempted to clarify its indecency ban that is in effect daily from 6 a.m. to 10 p.m. on AM and FM radio and commercial television. The FCC said that it applies three criteria to determine indecency: (1) explicitness or graphic nature of the depiction of sexual or excretory organs or activities; (2) whether the materials dwell on or repeat at length such sexual depictions; (3) the context and whether the depiction appears to pander or titillate or is presented for shock value. The heart of the FCC statement was 32 explicit examples from FCC indecency cases, 23 of which were ruled indecent. The indecent examples included the *Howard Stern Show* and songs with titles like "Uterus Guy," "You Suck," "Sit on My Face" and "Penis Envy." The nine segments that were found not to be indecent were from the "Geraldo Rivera Show," the film "Schindler's List" and the National Public Radio show "All Things Considered."

In addition, in 2005, Congress passed and a year later President George W. Bush signed a bill providing for a 10-fold increase in fines the FCC could levy on broadcast stations for air-

ing indecent material. Apparently fed up with sexual references and incidents like the brief exposure of singer Janet Jackson's breast in 2004 Super Bowl half-time performance, Congress set the maximum possible fine for each incident at \$325,000. The president signed the Broadcast Decency Enforcement Act of 2005 in June 2006.

Two years later, the Third U.S. Circuit Court of Appeals held that the FCC's fine against CBS was improper because the agency had failed to give adequate notice as to why it was changing its method of determining on-air indecency. The FCC had abandoned its policy of insulating what it called "fleeting expletives" from sanction. The court's ruling was short-lived, however. A year after the CBS ruling, the Supreme Court held in *FCC v. Fox Television Stations* that the FCC did not act improperly when it changed its policy. The Court remanded the CBS case for reconsideration in light of its ruling in the Fox Television case. To further complicate matters, the reversal of *Fox Television Stations* gave the Second Circuit an opportunity to reconsider the case on constitutional grounds. The case was originally considered only on whether the FCC had followed administrative law correctly when it changed the indecency policy. In 2010, the Second Circuit held that the FCC's policy related to indecency violated the First Amendment, and the Supreme Court granted *certiorari*. In 2012, the Court held that the FCC did not give adequate notice to Fox Television Stations and ABC for the broadcast of an episode of *NYPD Blue* and, therefore, the standards as applied to the broadcasts were vague. The Court set aside the FCC's orders.

The Supreme Court indicated in a 1975 case, *Erznoznik v. Jacksonville*, that there were limits to how far it would go to shelter children and disinterested adults from offensive speech that was not legally obscene. It ruled that a city ordinance prohibiting the showing of films with nudity in drive-in theaters with screens visible from streets or public places was unconstitutional. The theater was prosecuted for the R-rated film *Class of '74*. The screen was visible from two city streets and a church parking lot. The Court majority said the censorship was not justified by the limited privacy interests of persons on public streets who could simply look away when confronted by offensive material. It said that "all nudity cannot be deemed obscene even as to minors." Such a rule would bar films with pictures of baby's buttocks, nude bodies of war victims, cultures in which nudity is indigenous, the opening of art exhibits and bathers on a nude beach.

The Supreme Court applied similar logic when it invalidated the Communications Decency Act of 1996. The act made it a crime to communicate indecent material on the Internet to anyone 17 or younger. It defined "indecency" as patently offensive descriptions of sexual or excretory activities or organs. The Supreme Court said in *Reno v. American Civil Liberties Union* that the act would violate the First Amendment because it would allow Internet users to be punished for disseminating

such things as the seven "dirty words" of the George Carlin monologue, discussions of prison rape or safe sexual practices, nude artistic images or, arguably, the card catalog of the Carnegie Library. The Court concluded that the Internet was not as available to children as radio and television and that it was unconstitutional to deprive adults of sexual matter that was indecent but not obscene. The Court said banning such material "threatens to torch a large segment of the Internet community" and was like "burning the house to roast the pig."

In a 2000 ruling, *United States v. Playboy Entertainment Group, Inc.*, the Supreme Court again invalidated a provision of the Telecommunications Act of 1996 that had restricted the dissemination of indecent and erotic material. Two sections of the act had restricted the broadcasting by cable television of sexually oriented programming such as *Playboy Television* and *Spice*. The act required cable systems to fully scramble such programs so that the occasional and accidental bleeding of sexual images would not be available to children, or to delay the broadcasts to the safe harbor time period of 10 p.m. to 6 a.m., when children were less likely to be watching. Most cable systems opted for the delayed broadcasting because the technology for effective scrambling of signals was too expensive. Five justices agreed that the regulation unconstitutionally burdened the disseminators of programs that were indecent and sexual but not obscene. The majority favored the less restrictive and less intrusive alternative of requiring cable systems to inform their subscribers of a blocking option that would entirely block such sexual channels from their home televisions.

The *Reno v. ACLU* ruling provided First Amendment protection for indecency on the Internet but not for obscenity. Distributors of obscenity on the Internet have been successfully prosecuted. In addition, in 2006, the Supreme Court let stand a ruling by a federal three-judge panel for the Southern District of New York holding the obscenity provision of the Communications Decency Act was not overbroad. The federal court held that the plaintiff failed to meet its burden proving that the community standards prong of the *Miller* test was not applicable to the widespread scope of the Internet.

Congress has not given up in its attempt to protect children from sexual materials on the Internet. In 1998, following the *Reno* decision, it passed a statute that was narrower than the former Communications Decency Act. The new act, the Child Online Protection Act, prohibited easily accessible, commercial sexual materials on the World Wide Web that were harmful to minors. The law provided a three-part test, similar to the *Miller* test, to determine what content was harmful. Two of the three prongs were based on the application of community standards, which could mean local standards.

A U.S. court of appeals ruled that this use of community standards rendered the law substantially overbroad. The Supreme Court's 2002 ruling *Ashcroft v. American Civil Liberties Union* reversed the holding and ruled that it was just as valid to

apply local standards to the Internet as to films, magazines and dial-a-porn telephone conversations, as the Court had in previous cases.

In 2004, in its second opinion in the case — *Ashcroft v. ACLU* — the Supreme Court found unconstitutional the COPA provision that required Internet providers of porn to verify the age of customers. A five-justice majority found the age verification was not the least restrictive means of shielding minors from Internet pornography. The Court concluded that filters and blocking software on home computers were more effective methods.

Congress's third attempt to shield children from Internet sexual expression met with success. In 2000, Congress passed the Children's Internet Protection Act, which required libraries that received federal subsidies to place filters on all their computers connected to the Internet. The purpose of the filters was to block child pornography and overtly sexual material that was inappropriate for children.

In a plurality opinion by Chief Justice Rehnquist, the Court upheld CIPA in its 2003 ruling, *United States v. American Library Association*. It held: "Because public libraries have traditionally excluded pornographic material from their other collections, Congress could reasonably impose a parallel limitation on its Internet assistance program." It noted that the statute allowed libraries to disconnect the filters for adults.

The availability of sexual material on the Internet continues to trouble many people, especially parents and lawmakers.

### **Child Pornography**

The Constitution protects many portrayals of adults in sexual situations. But material that portrays minors is another matter. The Supreme Court, Congress, state supreme courts and legislatures have been unequivocal in authorizing criminalization of child pornography. In 1982, the Supreme Court upheld a state statute that prohibited the dissemination of material with sexual performances by children under the age of 16. *New York v. Ferber* involved a Manhattan store that sold films of young boys masturbating. The Court conceded that material depicting children in sexual situations could be prosecuted even if it would not be obscene had it depicted adults in the same situation. But, in reversing the state's highest appellate court, the Court said the paramount concern in such cases was protecting children who were portrayed in such materials from psychological, emotional and mental harm. This was clearly a compelling state interest that justified some limits on expression.

Eight years later in *Osborne v. Ohio* the Supreme Court upheld an Ohio law that prohibited the possession of materials depicting nude children unless they served a bona fide artistic, scientific or educational purpose. Clyde Osborne was sentenced to six months in prison for possession of four photographs of juvenile, nude males in sexually explicit positions. The Court said the gravity of the state interest in protecting victims of child

pornography justified the limits on free expression. The Ohio Supreme Court specifically limited its ruling to the lewd exhibition or graphic focus on genitals to prevent punishment for possession of innocuous photographs of naked children.

Child pornography, then, is one of the few categories of legally taboo speech in American society. However, during its 2001-02 term the Supreme Court found unconstitutional a federal law that criminalized images that did not involve real children but were computer images of fictitious children engaged in imaginary sexual conduct. The statute made illegal a visual depiction that appeared to be or "convey[ed] the impression" of a minor engaged in explicit sex. In a 6-3 opinion, the Court concluded in *Ashcroft v. Free Speech Coalition* that "The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse."

In 2008, however, the Court upheld the constitutionality of a federal law that makes it a crime to advertise material as child pornography, regardless of whether actual children are involved. Under the law, a crime occurs when an advertiser believes or intends for the customer to believe that the advertised material depicts real children.

### **PANDERING AND ZONING**

Most of this chapter has analyzed the definitional approach for restricting inappropriate or sex-themed expression. Zoning laws and the concept of pandering are other approaches for controlling such material. The more obscure of the two is pandering.

#### **Pandering**

The classic pandering case is *Ginzburg v. United States*. Ralph Ginzburg was sentenced to five years in federal prison and fined \$42,000 because of the method he used to promote his sex-themed but non-obscene books and periodicals. What was thought to be a liberal Supreme Court upheld the conviction by a 5-4 vote. Earl Warren and William Brennan voted to uphold the conviction because of Ginzburg's blatant pandering: "The business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers."

Ginzburg — a former articles editor for *Esquire* and staff writer for NBC and *Reader's Digest* — mailed nine million copies of a brochure to promote the book *The Housewife's Handbook on Selective Promiscuity*, the newsletter *Liaison*; and *Eros*, the hardcover quarterly devoted to love and sex. The mailings generated 150,000, \$25 subscriptions to *Eros*.

The Supreme Court said Ginzburg's method of promotion could be used to judge the content of the works: "Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity." Ginzburg had highlighted the erotic nature of his

publications by mailing the promotions from cities whose names had sexual connotations: Intercourse and Blue Ball, Pennsylvania, and Middlesex, New Jersey.

Civil libertarians denounced the decision. They pointed out that none of Ginzburg's publications were even close to satisfying the court's own definition of obscenity. *Eros* had received a number of national graphics awards, including one from the National Society of Art Directors. In order to secure a conviction, federal prosecutors had moved the trial from New York City to more conservative Philadelphia, where the mayor had narrowly won election on a promise to rid the city of smut, and the police department's obscenity control squad recently had arrested twenty-two magazine dealers and confiscated seventeen van loads of magazines. Ginzburg's appeal to the Supreme Court was supported by briefs of the American Civil Liberties Union, the Authors League of America and a group of writers that included literary icons Joseph Heller, James Jones, Norman Mailer and Arthur Miller.

### Zoning

A decade after *Ginzburg*, the Supreme Court approved another non-content approach for the control of obscenity. In *Young v. American Mini Theatres, Inc.*, it allowed cities to use zoning laws to limit the location and concentration of businesses that specialize in sex-themed media. The Pussy Cat, an adult theater in what had been a corner gas station, challenged a Detroit ordinance. The law said an adult business could not be located within 1,000 feet of two other adult businesses, or within 500 feet of a residential neighborhood. Adult businesses included pool halls, pawnshops and adult bookstores and theaters. The intent of the ordinance was to prevent the concentration of such businesses on one street.

In an opinion by Justice John Paul Stevens, the Court upheld the Detroit ordinance. Stevens wrote that the ordinance did not impose content limitations on the creators of adult movies or significantly restrict the viewing of such movies. He concluded that the impact of the ordinance on free expression was at most incidental and minimal. Justice Stevens attempted to create a doctrine granting sexual speech less protection than political speech, noting that "it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude, than the interest in untrammelled political debate." But only a minority of justices joined him on that point.

In 2002, the Supreme Court again found it was constitutional for cities to limit the geographic concentration of sex-themed businesses. In *City of Los Angeles v. Alameda Books, Inc.*, it upheld a Los Angeles ordinance that prohibited the presence of more than one adult business in a building. The Court said that such uses of zoning laws must be backed up by studies that document a relationship between a concentration of adult business and undesirable secondary effects such as increases in crimes

such as prostitution, robbery and assault.

Rudolph Giuliani, who was then the mayor of New York City, used a Detroit-type ordinance to banish topless bars and X-rated peep shows from the Times Square area. And the highest court in the state, the New York Court of Appeals, upheld the law. The unanimous decision noted that the number of adult establishments in New York City had grown from nine in 1965 to 177 in 1993; 107 of these were in Manhattan.

DVDs, the Internet and the growth of cable television with adult networks have diminished the significance of the *Young* decision. Across the United States, adult theaters have virtually disappeared.

### RATINGS AND LABELING

*Young* helped to shield disinterested adults from unwanted sexual expression. It empowered cities to isolate adult businesses from homes, schools and churches and made it easier for disinterested adults to avoid such businesses. Offensive businesses that are unobtrusive and easily avoided are easier to tolerate. The voluntary labeling of movies, recordings and video games has had the same effect. It gives adults fair warning about the explicit content of media and assists them in avoiding material they find offensive for themselves or their children.

The Motion Picture Association of America initiated the most successful of the rating systems after Jack Valenti took over as president in 1966. That year a new kind of frankness emerged in movies. *Who's Afraid of Virginia Woolf* included the word "screw" and the phrase "hump the hostess." More movies contained nudity. Because of the fear of government censorship, the movie industry decided to create its own system for rating films. The system has changed over the years. As it exists today, the system has five categories:

- G General Audiences. All ages are admitted. The film contains nothing in language, nudity and sex, or violence that would offend parents whose children view the film. Snippets of language may go beyond polite conversation, but they are common, everyday expressions.
- PG Parental Guidance Suggested. Some material may not be suitable for children. There may be some profanity, violence or brief nudity, but these elements are not intense. There is no drug use content.
- PG-13 Parents Strongly Cautioned. Some material may be inappropriate for children under 13. The rating is required for drug use content or use of harsher, sexually derived words.
- R Restricted. The admission of people under age 17 requires accompanying parent or adult guardian. The movie contains some adult material: hard language, tough violence, nudity within sensual scenes or drug abuse.
- NC-17 No Children Under 17 Admitted. The content of the movie is patently inappropriate for youngsters. The rating does not necessarily mean the content is obscene or pornographic. It

can mean the presence of violence or sex or aberrational behavior or drug use that is too strong and therefore off-limits for viewing by children.

Leaders in the motion picture industry consider the movie rating system a success. The National Association of Theater Owners and the Video Software Dealers Association have embraced it. Polls conducted by the Opinion Research Corporation of Princeton, New Jersey, show that three-quarters of parents with children found the system very useful or fairly useful in selecting movies for their children.

The recording and video games industries have also adopted ratings, but in a more limited way. In 1985 the Recording Industry Association of America agreed to encourage its members to place the warning "Explicit Lyrics — Parental Advisory" on recordings containing references to explicit sex, violence or substance abuse. Instead of the warning, song lyrics may be printed on the back of the album cover. In 1994 the Software Publishers Association, following threats from Congress, agreed to encourage its members to label computer and video games. Games are labeled for age appropriateness and for the explicitness of violence, nudity or sex, and language.

The major advantage of such ratings is that, because they alert consumers to content, they tend to discourage the involvement of government in controlling that content. Congress has not been fully satisfied with the actions of the software industry, however, and several bills aimed at the industry were introduced but did not pass the 107th Congress.

And in 1996, with pressure from Congress, most TV networks agreed to a voluntary rating system. The six classifications are:

- TV-Y. Children's programs acceptable for kids of all ages.
- TV-Y7. Children's programs for ages seven and older that might have material upsetting to younger kids.
- TV-G. Appropriate for audiences of all ages.
- TV-PG. Parental guidance suggested, may contain violence, sexual material or offensive language.
- TV-14. Inappropriate for kids under 14 because of more intense violence and sexual content.
- TV-MA. Not for children under 17, may contain sex, profane language or graphic violence.

Additional rating subcategories were the following: V — violence, S — sexual situations, L — coarse language, D — suggestive dialogue and FV — fantasy violence. Television sets with "V-chips" may be programmed to restrict access to different categories of programs.

## SUMMARY

The landmark Supreme Court ruling in *Miller v. California* was not greatly heralded by either side of the sexual expression divide. In its aftermath, sexual-themed materials have become more available. Some of this may be attributed to technological developments that have provided easy access to the materials in

private dwellings instead of public places. Increased access has occurred despite the ongoing efforts of virtually every state legislature to draft restrictive statutes. Sex-themed materials also have become quite commonplace in Canada. Under Canadian supreme court rules, portrayals of explicit sex are legal if they do not include degradation or violence.

Social mores are also arguably responsible because they clearly have grown quite tolerant of unobtrusive erotica. This often translates into less pressure on prosecutors and police to enforce obscenity laws and jurors who are less easily offended.

Nonetheless, the divide over sexual expression remains. It is part of what are referred to as the culture wars.

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