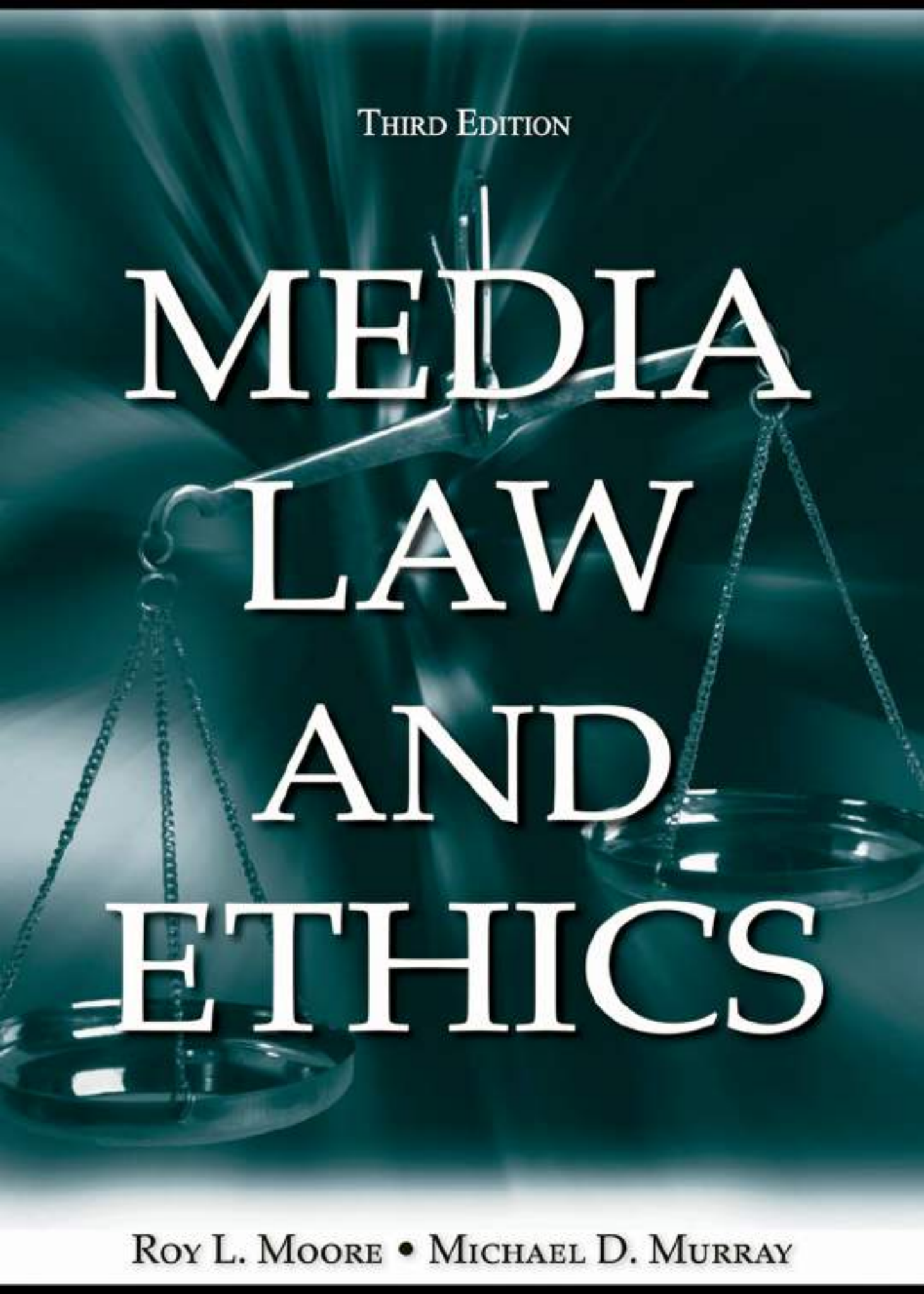
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CHAPTER
9

Indecency, Obscenity, and Pornography

Major fines by the FCC have focused attention on government efforts to address indecency on traditional over-the air television. In fall 2004, the Fox Broadcasting Company, facing an FCC fine of $1.2 million, took issue with federal regulators who said that an episode of "Married by America" that aired April 7, 2003, featuring male and female Las Vegas strippers in sexual situations, was indecent and patently offensive. The FCC said, "Although the nudity was pixilated, even a child would have known that the strippers were topless and that sexual activity was being shown."[1] On that occasion, still in the wake of the exposure of Janet Jackson's breast ("Nipplegate") during the 2004 Super Bowl half-time show on CBS, FCC commissioners voted unanimously to fine each of the 169 Fox affiliates airing the "Married by America" program $7,000, totaling $1.183 million.

Beyond these efforts to address transgressions by the so-called traditional media, the federal government has taken steps recently to address issues raised by the growth of obscenity and indecency on the Internet, including protecting children from sexually explicit materials online. This concerted effort was best represented by Congress' creation of the Commission on Online Child Protection (COPA). The commission released a report in October 2000, evaluating child protection policies and technologies including accessibility, costs, and methods of protection such as monitoring and family contracts. It identified the need for a public education campaign to alert the entire nation to the growth of online materials harmful to minors and methods available to protect children while they are online.

The commission noted the growth of this material and encouraged government support for legislation to address it. It also attempted to offer industry and the private sector the incentive to engage in a national debate to address the next generation of systems for identifying, evaluating, and labeling content to protect young people. While the results have been uneven, the government, working especially with public

libraries, made the first meaningful effort to identify a serious, growing problem and has taken the first few small steps to address it.

Much of the Internet material most potentially harmful to minors originates abroad. Other new technologies geared toward adults have created new venues for sexually explicit materials or pornography.

The demise of American Exxxtasy, an X-rated satellite subscription service, is an interesting illustration of the ongoing clash between purveyors of pornography and local, state, and federal government officials. It is also an unusual example of the type of gap that occasionally emerges between a new media technology and law enforcement. The public and customers of obscene materials play a minor role in the inevitable battle between the two powerful adversaries. Public opinion polls consistently find that most citizens consider proliferation of sexually explicit materials a problem. But they do not favor actions by police against bookstores, theaters, and others because they feel that adults should be able to judge themselves and consume even works explicitly depicting sexual conduct unless depictions include minors, violence, or deviant sex. Meanwhile, statutes imposing strict bans on child pornography enjoy widespread public support.

Officials of Home Dish Only (HDO) Satellite Network, the parent corporation of American Exxxtasy, pleaded guilty in 1990 to two misdemeanor charges of distributing obscene materials. Less than a year later, the company pled guilty to federal charges of broadcasting obscenity via satellite to New York and Utah.

HDO transmitted its signal around the country from New York for four years via satellite space leased from GTE, a major satellite owner. The X-rated movies were carried only after 8:00 p.m. and were scrambled so that only the 30,000 paying subscribers could legally view them. The service was not available to cable customers, only to satellite dish owners. For a fee of $150 for six months or $240 a year, subscribers received an alternating stable of movies and other sexually explicit programs of the type available in most video rental stores that carry X-rated titles. Except for promotional announcements that included nudity in R-rated rather than X-rated excerpts from its films and except for an occasional commercial program offering adult videos and sexually related products such as condoms and vibrators, Amexxx was scrambled. These announcements were broadcast unscrambled ("in the clear") an hour or so prior to the scrambled X-rated (or as HDO called them "triple X-rated") programs.

How was HDO indicted and ultimately forced to plead guilty to obscenity charges or face likely conviction by juries in the state and federal courts? Amexxx is an example of how the law eventually caught up with technology. HDO was able to carry its XXX-rated channel nationwide and bypass cable systems via the same technology that transformed a small UHF television station owned by Ted Turner into Superstation TBS—geostationary satellites that spin with the earth's orbit. Section 639 of the Cable Communications Policy Act of 1984 provides: "Whoever transmits over any cable system any matter which is obscene or otherwise unprotected by the Constitution of the United States shall be fined not more than $10,000 or imprisoned not more than two years, or both."[2] Notice that the provision made no mention of

satellite transmission or subscription TV. That omission was remedied with Public Law 100-690 in 1988:

> §1468. Distributing Obscene Material by Cable or Subscription Television.
>
> (a) Whoever knowingly utters any obscene language or distributes any obscene matter by means of cable television or subscription services on television, shall be punished by imprisonment for not more than 2 years or by a fine in accordance with this title or both.
>
> (b) As used in this section, the term "distribute" means to send, transmit, retransmit, telecast, broadcast, or cablecast, including by wire, microwave, or satellite, or to produce or provide material for such distribution.
>
> (c) Nothing in this chapter, or the Cable Communications Policy Act of 1984, or any other provision of Federal law, is intended to interfere with or preempt the power of the States, including political subdivisions thereof, to regulate the uttering of language that is otherwise obscene or otherwise unprotected by the Constitution or the distribution of matter that is obscene or otherwise unprotected by the Constitution, of any sort, by means of cable television or subscription services on television.[3]

By including "satellite" in the definition of "distribute," Congress granted the FBI the authority to prosecute Amexxx. Note that the section included a clause (item c) that makes it clear the states still retained the authority to conduct their own prosecutions. In fact, Montgomery County, Alabama's District Attorney Jimmy Evans, who was a candidate for state attorney general at the time, was the first official to prosecute HDO. He convinced an Alabama grand jury to indict four executives of the network for allegedly violating state obscenity statutes. Eventually, HDO pled guilty to two misdemeanor charges of distributing obscene material and was fined $5,000 and forced to pay $75,000 each to two children's homes.

According to rumors in the satellite industry trade press at the time of the prosecutions, Alabama authorities were alerted to Amexxx after school officials discovered that high school students were distributing among their peers tapes of the network's programming, some of which may have been recorded with pirated or illegal descramblers. FBI agents filed their charges after an agent purchased a decoder and paid a subscription fee to watch the programming. The agency began its 13-month investigation after dish owners complained about Amexxx's unscrambled commercials. HDO pled guilty before it could be indicted by a federal grand jury. HDO was fined $150,000 on a single count of broadcasting obscenity via satellite and agreed to a consent decree under which it erased all of its X-rated movie inventory.[4]

In addition to American Exxxtasy, HDO offered a premium movie service known as Stardust and an R-rated adult service called Tuxxedo, both of which folded shortly after the Alabama indictments, apparently because revenues of Amexxx were subsidizing the other services. All three services were available only to dish owners.

Although American Exxxtasy is gone forever, both current major satellite dish services—DirecTV and Dish network—offer X-rated programming. DirecTV offers five adult channels, including Playboy TV and Spice HD, a high definition channel. Dish offers six adults-only channels, including Private Fantasy and TENXtsy, which it describes on its Web site as an "uncensored channel delivering the wildest situations the adult world has to offer." Some of the adult channels, including Playboy, feature sexually oriented viewer call-in shows. The satellite services are not the only media outlets offering explicit adult programming. Most cable systems offer a similar array of pay channels. Times, or at least contemporary community standards, have clearly changed since 1990 when American Exxxtasy disappeared.

The Internet was still relatively new in the mid-1990s when federal and state authorities began a crackdown on X-rated material on this global communications network. For example, Carleen and Robert Thomas were convicted in U.S. District Court in Memphis, Tennessee, in 1994 for transmitting obscenity via interstate phone lines on a member-only electronic bulletin board, "Amateur Action Bulletin Board System." Residents of California, the couple operated their service from there, but were prosecuted in Tennessee after a resident complained. They were convicted on 11 counts of obscenity, but acquitted of charges of child pornography. Some of the pictures transmitted via e-mail included scenes of bestiality and sexual fetishes.[5]

Sophisticated tracking software and databases are now being used to identify children who have been used in making pornography.[6]

About the same time, the FBI arrested a 20-year-old University of Michigan student for posting a story on the Internet that included discussions about his fantasy of raping, killing, and torturing a classmate whom he named. The events discussed with a fellow Internet user in Canada never occurred, and the student never made any actual threats against his classmate. Jake Baker was charged with five counts of transmitting by e-mail a threat to kidnap or injure. However, U.S. District Court Judge Avern Cohn ruled that Baker's discussions had First Amendment protection and dismissed the charges. Baker was jailed for 29 days after he was charged. The Virginia Tech mass murders in 2007 forced another reevaluation of the influence of the Internet on crime.

Pushing the decency envelope even further has become more commonplace with the emergence of satellite radio. In what some critics call "lewd" and even a set-back to feminism, one bawdy female radio host heard on Sirius Satellite Radio calls herself the "Radiochick." She invites female guests to strip in the studio while advising her male callers on such issues as how to cheat on their girlfriends with impunity. Of course, what is considered "lewd" and what is regarded as "smut" are often left to the audience to determine, and then selective perception comes into play.[7]

From *Hicklin* to *Roth*: An Emerging Definition of Obscenity

It took a new federal statute for the federal government and the state of Alabama to successfully prosecute HDO for transmitting obscenity via satellite, but a U.S. Supreme Court decision 17 years earlier provided the real foundation for the demise of the X-rated programmer.

Obscenity has been suppressed and prosecuted throughout history, always somehow managing to survive even when it was forced to go underground, and it has actually thrived during some eras. Until 1957 the U.S. Supreme Court avoided getting embroiled in defining obscenity, relying instead on lower courts to enunciate the boundaries between acceptable and unacceptable sexually oriented speech.

The two major influences on obscenity prosecutions from approximately the mid-19th century to the mid-20th century were an American named Anthony Comstock and an 1868 British court decision known as *Regina v. Hicklin*.[8] Comstock lived from 1844 to 1915. He founded and directed the New York Society for the Suppression of Vice, which was instrumental in lobbying state and federal legislators to enact statutes strictly regulating obscenity. The statutes whose passage he spearheaded were popularly known as "Comstock laws." The federal law was enforced primarily by the U.S. Post Office, which had the authority to bar the mailing of obscene materials and to prosecute violators. During much of the time he was involved in the suppression, Comstock was a paid special agent of the Post Office and reportedly received a share of the proceeds from the fines imposed on offenders. The current federal statute and many state statutes today still reflect the cries of the anti-obscenity crusades of Anthony Comstock.

Regina v. *Hicklin*

Regina v. Hicklin began when British Trial Court Judge Hicklin enforced an anti-obscenity law by ordering the confiscation and destruction of copies of a pamphlet entitled *The Confessional Unmasked*, which included depictions of sexual acts. The trial court's decision was upheld on appeal to the Queen's Bench in an opinion by Lord Chief Justice Cockburn, who formulated what become known as the Hicklin test for determining obscenity: "whither the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort might fall."[9]

The test essentially barred all sexually oriented materials because (a) an entire publication could be considered obscene if *any* portion, no matter how small, could "deprave and corrupt"; and (b) the work was obscene if it would deprave and corrupt the minds of even the most sensitive and easily influenced individuals, including children. In fact, successful prosecution did not require that the Crown demonstrate the materials actually fell into the hands of susceptible people but merely that they *could* end up there. By taking isolated passages out of context and convincing judges and juries that these passages could stimulate immoral thoughts within children and other sensitive individuals, the state could successfully censor almost any publication referring to sexual conduct of any type.

Until the Civil War (1861 to 1865), public concern in the United States over obscenity was not high. But when stories appeared about soldiers reading and viewing allegedly pornographic materials, the stage was set for severe suppression of such works after the war. With Anthony Comstock at the helm, legislators and judges responded by enforcing statutes already on the books and enacting new laws where needed.

Because the U.S. Supreme Court had never dealt with the issue head-on, the lower courts, both state and federal, generally adopted the handy *Hicklin* definition complete with the isolated passage and sensitive individual provisions.

U.S. v. Ulysses

The tide against this oppressive rule began to turn in 1934 when U.S. District Court Judge John M. Woolsey in New York held that James Joyce's *Ulysses* was not obscene and, therefore, could be imported into the United States.[10] (Customs officers had prohibited the book's entry into this country.) Judge Woolsey rejected the *Hicklin* rule and instead offered a new test that nevertheless kept some elements of the old rule. According to Judge Woolsey, a work is obscene if it "tends to stir the sex impulses or to lead to sexually impure and lustful thoughts. Whether a particular book would tend to excite such impulses must be the test by the court's opinion as to its effect [judged as a whole] on a person with average sex instincts."[11]

Thus the isolated passages provision of *Hicklin* was replaced by the requirement that the work must be judged in its entirety and that the court must look at the effect of the material on the average person ("a person with average sex instincts"), not on sensitive individuals. Another significant change was the substitution of "lead to sexually impure and lustful thoughts" for "deprave and corrupt." This essentially meant that the work must be sexually exciting, not merely corrupting or, as later court decisions said, including those of the U.S. Supreme Court, the material must appeal to prurient interests. There is still debate among scholars over how much influence the *Ulysses* holding had on modern obscenity tests, but it is clear that *Hicklin* was crumbling away by the time of *Ulysses* and the U.S. Supreme Court would eventually have to intervene to bring some consistency to obscenity prosecutions.

One year later, the Second Circuit U.S. Court of Appeals affirmed the lower court decision, and the federal government chose not to appeal the ruling, thus denying the U.S. Supreme Court the opportunity to consider the case. *Ulysses* miraculously survived the *Hicklin* sword, primarily because of an enlightened jurist who realized the book deserved First Amendment protection, but other literary works were not so fortunate and were at least temporarily banned thanks to *Hicklin*. These have included Henry Miller's *Tropic of Cancer*, Ernest Hemingway's *For Whom the Bell Tolls*, Erskine Caldwell's *Tobacco Road*, William Faulkner's *Mosquitoes,* and Dr. Alan Guttmacher's *Complete Book of Birth Control*.[12]

Butler v. Michigan: Rejecting the Hicklin Standard

Except for a few isolated decisions involving matters that were more procedural than substantive, the U.S. Supreme Court waited until 1957 to assume the task of defining obscenity. In *Butler v. Michigan* (1957)[13] the Court struck down as unconstitutional a provision in the Michigan Penal Code that banned any material "tending to incite minors to violent or depraved or immoral acts manifestly tending to the corruption of the morals of youth." According to the unanimous opinion by Justice Felix Frankfurter:

> The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely this is to burn the house to roast the pig. . . . We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children.[14]

Roth v. U.S. and *Alberts v. California* (1957): A New Obscenity Standard

The *Butler* decision was especially significant because it specifically rejected the *Hicklin* standard on which the Michigan statute had been patterned and thus paved the way for the Court's landmark ruling exactly four months later in *Roth v. U.S.* and *Alberts v. California* (1957).[15] Samuel Roth was convicted by a jury in the U.S. District Court of the Southern District of New York for violating *federal* obscenity statutes—more specifically, the Comstock Act—barring the mailing of obscene materials. He had allegedly mailed obscene circulars, ads, and a book, *American Aphrodite*. His conviction was affirmed by a federal appeals court.

Mail order entrepreneur David S. Alberts was sentenced by a California municipal court for violating obscenity provisions of the California Penal Code. His conviction in a bench trial was upheld by a federal appeals court. The U.S. Supreme Court struggled with the case, as evidenced by the 5 to 4 majority opinion, which included a 7 to 2 vote upholding the conviction of Alberts and a 6 to 3 vote affirming Roth's conviction. The majority decision, written by Justice William Brennan who had been nominated only a few months earlier by President Eisenhower, offered broader protection for sexual expression than had been previously granted. But the Court made it clear that obscene speech did not fall under the First Amendment. The Court began by settling the issue:

> The dispositive question is whether obscenity is utterance within the area of protected speech and press. Although this is the first time the question has been squarely presented to this Court, either under the First Amendment or the Fourteenth Amendment, expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press.[16]

The significance of this point is that once material has been properly deemed obscene by a court, prior restraint can be imposed within the limitations of *Near v. Minnesota* (1931).[17] Justice Brennan went on to note:

> All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties [of the First and Fourteenth Amendments], unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . . We hold that obscenity is not within the area of constitutionally protected speech or press.[18]

The last statement led to this test being characterized as the "utter" standard for judging obscenity. There are four prongs to the test: (a) whether to the average person, (b) applying contemporary community standards, (c) the dominant theme of the material taken as a whole (d) appeals to prurient interest. The Supreme Court has spent the decades since this decision attempting to define terms such as: *average person, contemporary community standards,* and *prurient interest*. The Court made a good faith but unsuccessful effort to distinguish sex from obscenity:

> Sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.[19]

Smith v. California (1959): The Requirement of Scienter

The next piece in the perplexing obscenity puzzle emerged two years later in *Smith v. California* (1959)[20] in which the U.S. Supreme Court unanimously reversed the conviction of a Los Angeles bookstore owner for violating a municipal ordinance barring the possession of any obscene or indecent writings, including books, in any place of business. Justice Brennan was able to garner the agreement of four other justices (although they were not the same four who had joined him in *Roth*) in holding that the ordinance was unconstitutional because the city law made booksellers liable even if they were unaware of the contents of the book. The other four justices concurred in the result but with different reasoning. According to the majority, in order to pass constitutional muster, such an ordinance must require the government to prove *scienter*—that is, the individual had knowledge of the contents of the allegedly obscene materials. Otherwise, the Court reasoned, a chilling effect would prevail:

> If the bookseller is criminally liable without knowledge of the contents and the [ordinance] fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. . . . And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed.[21]

State statutes now typically include this element of *scienter* as essential for an obscenity conviction. Kentucky's penal code dealing with the distribution of obscene matter, for example, reads: "A person is guilty of distribution of obscene matter when, *having knowledge of its content and character . . .*" (emphasis added).[22] Georgia's parallel statute stipulates that the offense of distributing materials occurs when a person

sells, lends, and so forth, or otherwise disseminates obscene material "knowing the obscene nature thereof" and defines "knowing" as "either actual or constructive knowledge of the obscene contents of the subject matter, and a person has constructive knowledge . . . if he has knowledge of the facts which would put a reasonable and prudent person on notice as to the suspect nature of the material."[23]

The U.S. Supreme Court handed down a major opinion dealing with *scienter* in obscenity prosecutions in 1994. In *United States v. X-Citement Video*,[24] the Court ruled 7 to 2 in a decision written by Chief Justice Rehnquist that the language of the Protection of Children Against Sexual Exploitation Act of 1977 could be properly read to include a *scienter* requirement. Only Justices Thomas and Scalia dissented. A video owner and operator challenged his conviction under the Act for selling 49 tapes featuring porn queen Traci Lords in sexually explicit films made while she was under age 18. The defendant sold the tapes to an undercover police officer and shipped eight more Traci Lords tapes to the same policeman in Hawaii.

The majority opinion engaged in an interesting grammar exercise that ultimately reversed a Ninth Circuit U.S. Court of Appeals ruling. The lower appellate court held that the Act was unconstitutional because it did not require defendants to know one of the performers was a minor.

The Supreme Court decision is a good illustration of how the Court will make every effort to construe an obscenity statute to meet the *scienter* requirement. Two sections of the Act were in dispute, and "knowingly" appears in both. The adverb is placed next to "transports or ships" and "receives, or distributes" rather than appearing with "involves the use of a minor engaging in sexually explicit conduct." The appellate court had opted for "the most natural grammatical reading"—that "knowingly" did not modify "involves the use . . ." According to the Supreme Court, there is a "standard presumption in favor of a *scienter* requirement." That presumption would favor a finding that "knowingly" included use of a minor.

Manual Enterprises v. Day (1962): Patent Offensiveness

In 1962 the U. S. Supreme Court considered a new aspect of the definition of obscenity: sexual explicitness or what has become known as *patent offensiveness*. In *Manual Enterprises v. Day*,[25] a majority of justices led by Justice John M. Harlan overturned a U.S. Post Office Department ban against the mailing of several gay oriented magazines with titles such as *MANual, Grecian Pictorial,* and *Trim* that the court characterized as "dismally unpleasant, uncouth and tawdry."

Why were the magazines protected? They featured male nudity but were not patently offensive. Justice Harlan noted the Post Office had not been able to ban materials featuring female nudity, and male nudes were no more objectionable than female nudity even if directed to homosexuals. *Patently offensive* was added as a new requirement to the definition of obscene. What is *patently offensive*? Material that "affronts community standards," according to the Court.

But what *community* is used to determine community standards? This question has been one of the most troublesome faced by the Court. Two years after *Manual*

Enterprises, the U.S. Supreme Court attempted to define this important concept when it reversed the conviction of the manager of a movie theater in Cleveland Heights, Ohio. He had been convicted in a bench trial of two counts of possessing and showing *Les Amants* ("The Lovers"), which includes a fairly explicit but brief love scene. His punishment was a $2,500 fine; his convictions were upheld by an intermediate state appellate court and by the Ohio Supreme Court.

The effort of the Court to define the concept added to the confusion and signaled further trouble ahead. Six justices in *Jacobellis v. Ohio* (1964)[26] agreed that Nico Jacobellis had been wrongly convicted. They splintered in their reasoning, resulting in a plurality opinion. Pieced together, however, the various opinions of the justices supporting a reversal appeared to point to a national standard in line with what the Court had enunciated earlier in *Roth and Alberts*. The case illustrates how complex and difficult it is to define *community* for purposes of obscenity.

Most memorable from *Jacobellis* was a now-famous statement in Justice Potter Stewart's concurring opinion attempting to define *obscenity*: "I know it when I see it, and the motion picture involved in this case is not that." Stewart's statement has been ridiculed and satirized for obtuseness, but he was making an important point that obscenity convictions should be limited to what is typically characterized as hard core pornography, not works merely dealing with sex.

On the same day as *Jacobellis*, the justices handed down another obscenity decision, but this one dealt with a different controversy—whether an adversary hearing must be held to determine that materials are obscene before a search warrant is approved. Once again, the justices splintered. Seven justices agreed in *A Quantity of Copies of Books v. Kansas* (1964)[27] that a state statute permitting prosecutors to obtain warrants for the seizure of allegedly obscene materials without an adversarial hearing was unconstitutional. They disagreed on the reasoning.

According to the Court, under the Constitution, materials that had been determined to be obscene by a judge could be seized and then legally destroyed. However, the Kansas statute allowed a seizure order to be executed before any adversarial hearing was held. In effect, prosecutors were serving as judges in determining what was and what was not obscene. According to a plurality opinion authored by Brennan, the statute posed a danger that the public would be denied access to non-obscene, constitutionally protected works to punish the obscene.

Freedman v. Maryland (1965): The Constitutionality of Censorship Boards

A similar sticky issue arose in 1965 in *Freedman v. Maryland*,[28] although by then the justices had begun to agree some on procedural points even though other important matters continued to elude them. In *Freedman,* the Court unanimously struck down a Maryland statute that mandated that movie exhibitors submit their films in advance to a state board of censors. Justice Brennan wrote the majority opinion that declared the law a clear violation of the First Amendment. The Court said the

statute placed the burden of proof on the exhibitor and failed to provide a means for prompt judicial scrutiny of an adverse decision by the board, which granted licenses only for those films that it approved as not being obscene.

Ronald Freedman was convicted for showing a film, *Revenge at Daybreak*, prior to submitting it to the censorship body. Interestingly, the board indicated in its arguments against Freedman's appeal of his conviction that the film was not obscene. It would have been approved if reviewed. The Court saw the board's action as unconstitutional prior restraint because the law "fails to provide adequate safeguards against undue inhibition of protected expression."[29]

The Court held that, to escape the First Amendment axe, "a non-criminal process which requires the prior submission of a film to a censor" must have three procedural safeguards:

> First, the burden of proving that the film is unprotected expression must rest on the censor. . . . Second, while the State may require advance submission of all films . . . the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression. . . . [Third] the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.[30]

The *Fanny Hill* Case: Applying the "Utter" Test

On March 21, 1966 the U.S. Supreme Court announced three decisions focusing on obscenity, each of which touched on a different aspect of the controversy that refused to go away. In *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*,[31] the Court reversed a ruling that the famous 1750 British novel popularly known as *Fanny Hill* was obscene. The book had been widely available in this country since the early 19th century, but Massachusetts was determined to ban it. The book had been reissued in 1963 by G. P. Putnam's Sons Publishers. The commonwealth banned the novel in spite of the fact that the publisher had orders from many universities and libraries, including the Library of Congress.

Fanny Hill is not a book for the faint of heart although its language is rather reserved by modern standards. As the prosecuting attorney noted at the hearing that led to the ban, the work describes several acts of heterosexual intercourse, male and female homosexuality, flagellation and female masturbation. Nevertheless, expert witnesses at the proceeding testified that the book had literary, cultural, and educational value.

Once again, the U.S. Supreme Court struggled with the nature of obscenity. Six members of the Court voted to reverse the equity court ruling and declare *Fanny Hill* was not obscene, but no majority opinion surfaced. Instead, Justice Brennan forged a plurality opinion with Chief Justice Warren and Associate Justice Abe Fortas that strongly reaffirmed the three-pronged *Roth* test. The opinion said the

Massachusetts Supreme Court erred in ruling a jury could declare the book obscene without finding that the work was "utterly without redeeming social value." According to Justice Brennan, *any* redeeming social value, is sufficient to save a work:

> We defined obscenity in *Roth* in the following terms: 'whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' [citation omitted] Under this definition, . . . three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[32]

Ginzburg v. U.S. (1966): Pandering

The central issue of the second case handed down on March 21, 1966 was the role of *pandering*, or the way in which a work is promoted and advertised, in determining whether material is obscene. In *Ginzburg v. U.S.* (1966),[33] Justice Brennan was able to attract four other justices, including the Chief Justice, for a majority opinion affirming the 28-count conviction of Ralph Ginzburg for engaging in "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of customers." The dissenting voices of the remaining four justices were unusually strong in condemning the majority holding.

Ginzburg was convicted, fined $28,000, and sentenced to five years in prison for violating federal obscenity statutes by mailing *Eros*, a magazine dealing with sex; *Liaison*, a biweekly sex-oriented newsletter; and a book entitled *The Housewife's Handbook on Selective Promiscuity*. Where did Ginzburg go wrong? The materials he distributed were probably not obscene, a point conceded by the prosecution. As Justice Brennan noted in his opinion, the prosecutor "charged the offense in the context of the circumstances of production, sale, and publicity and assumed that, standing alone, the publications themselves might not be obscene." Yet Justice Brennan and four of his colleagues upheld the conviction because, as Justice Brennan said, Ginzburg had shown the "leer of the sensualist." The Court extended the message that if distributors promote works in a manner that emphasizes non-redeeming social value or sexual provocativeness, the materials can be assumed to be obscene. This assumption applies, putting aside the promotion or pandering, to materials otherwise not obscene. According to the majority opinion:

> We agree that the question of obscenity may include consideration of the setting in which the publications were presented. . . . Each of the accused publications was originated or sold as stock in trade of the sordid business of pandering. . . . 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. . . . In close

> cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test.[34]

The dissenters were as fractured in their reasoning as the majority, but they shared a conviction that the majority had made a serious error in its decision to uphold Ginzburg's sentence. Justice Hugo L. Black took his usual stand that the federal government had no authority under the Constitution to censor any speech or expression of ideas. He said, "As bad and obnoxious as I believe governmental censorship is in a Nation that has accepted the First Amendment as its basic ideal for freedom, I am compelled to say that censorship that would stamp certain books and literature as illegal in advance of publication or conviction would in some ways be preferable to the unpredictable book-by-book censorship into which we have now drifted."[35]

Justice Douglas continued with his consistent theme contending "the First Amendment does not permit the censorship of expression not brigaded with illegal action," a relatively absolutist view that he clung to until he retired from the Court in 1975. Justice Harlan concurred with the dissenters on grounds that government could ban only hard-core pornography, a category into which he felt these materials did not fall. Finally, Justice Stewart dissented because he believed that censorship "is the hallmark of an authoritarian regime. In upholding and enforcing the Bill of Rights, this Court has no power to pick or to choose."

Mishkin v. New York (1966): Obscenity Directed to Deviants

The third and final decision handed down on that same day involved an intriguing argument by an obscenity defendant. Edward Mishkin was sentenced to three years in prison and fined $12,500 for selling obscene books that Justice Brennan said in his majority opinion "depict such deviations as sado-masochism, fetishism and homosexuality." Typical titles were *Dance with the Dominant Whip* and *Mrs. Tyrant's Finishing School*, hard-core porn featuring explicit sexual depictions. But Mishkin argued on appeal that they did not meet the *Roth* test for prurient interest because the average person would find them unappealing rather than sexually stimulating. The Court called his bluff and, in a 6 to 3 decision, upheld his conviction in *Mishkin v. New York* (1966). According to the Court, "Where the material is designed for and primarily disseminated to a clearly defined sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group."[36]

Although *Roth* is no longer the test for determining obscenity, *Mishkin* has never been overturned and thus presumably still dictates the rule of determining the reference group for prurient appeal—go to the group to which the work is directed. As Mishkin soon learned, there is no loophole for evading the prurient appeal requirement.

In *Mishkin*, the Court simply said that the materials were aimed at those individuals interested in the particular "deviant sexual practices." Does this mean that

magazines depicting gay men and lesbian women will pass the prurient appeal test if they sexually excite or stimulate members of these particular groups? The Court in *Mishkin* apparently assumed that the specific type of sex shown determined the prurient-appeal reference group, i.e., books focusing on sadomasochism would be judged by their prurient appeal to the average sadomasochist and so on.

Yet, studies have shown the vast majority of pornography is geared to heterosexual males, although there is also now a flourishing market for gay material. Little of the material is geared to lesbians and female heterosexuals, even though the vast majority of books, magazines, videos, and so on, available from above-ground sources such as adult bookstores and the adult sections of local video rental outlets portray heterosexual and purported "lesbian" couplings. In other words, the reference group cannot always be determined by simply reviewing the types of sex depicted, as illustrated by the fact that the primary audience for sexually explicit works portraying lesbians is considered to be male heterosexuals, not lesbians. The predominant consumers of gay materials are homosexual men. Which specific reference group is used to determine the *average person* for the *Roth* prurient interest test? The Court has avoided the issue, allowing the lower courts to make this crucial determination, resulting in inconsistency.

Ginsberg v. New York (1968): Variable Obscenity Laws

After its 1966 triple holdings, the U.S. Supreme Court apparently became so frustrated that it effectively abandoned its efforts to define obscenity until the "seven-year itch" hit in *Miller v. California* (1973).[37] By 1967 the august body was ready to freely admit it had reached a deadlock. There was no agreement among its members as to the meaning of obscenity, even for those who had stuck together in reversing and affirming lower court obscenity convictions.

In a *per curiam* decision in *Redrup v. New York* (1967),[38] a majority of the justices outlined their individual tests and reversed the conviction of a clerk at a New York City newsstand for selling the paperbacks titled *Lust Pool* and *Shame Agent* to plain-clothed police. As part of the same decision, the Court also reversed the conviction of a Kentucky bookstore owner for allowing a female clerk to sell two magazines, *High Heels* and *Spree*. The majority also overturned a civil decision by a prosecuting attorney in Arkansas who declared several magazines obscene, including *Gent, Swank, Bachelor, Modern Man, Cavalcade, Gentleman, Ace,* and *Sir.*

In its brief, unsigned opinion, the Court acknowledged the reversals were in order regardless of the test. For the next two years, the Court handled obscenity cases, which climbed in number, by denying certiorari or by reversing convictions whenever at least five justices, applying individual tests, could agree the particular materials in question were not obscene. Dozens of cases were handled this way, without the benefit of oral arguments or written opinions. The iron was not hot enough yet to be struck. That would change.

The next year the Court upheld the constitutionality of a New York statute known as a *variable obscenity law.* In *Ginsberg v. New York* (1968)[39] (not to be

confused with *Ginzburg v. United States* two years earlier), a 6 to 3 majority ruled that the statute, which prohibited the knowing sale to individuals under 17 years old of "materials harmful to minors" regardless of whether the works would be obscene to adults, was constitutional. The decision was not a major surprise. The most liberal courts have approved good-faith efforts to protect children from products readily available to adults such as alcohol and cigarettes. That trend has continued with the Court consistently upholding child pornography or "kiddie porn" laws that apply much stronger standards for children than for adults.

The case arose when Sam's Stationery and Luncheonette, operated on Long Island by Sam Ginsberg and his wife, sold two "girlie" magazines to a 16-year old boy. The magazines had already been declared not obscene by the U.S. Supreme Court. This happened the year before in *Redrup v. New York*. But the judge convicted Ginsberg for violating a state statute. The statute established minors as the group used to determine whether the materials were harmful, appealed to prurient interest and so on, when such materials were knowingly distributed to minors. The general purpose of the law was to keep works that were perfectly permissible for sale to adults out of the hands of minors. The judge suspended Ginsberg's conviction. The defendant appealed anyway. Ginsberg also attacked the statute as void for vagueness because of its use of the concept "harmful to minors" and other terminology, but the Court refused to accept this argument as well.

On the same day as *Ginsberg*, the Court struck down a Dallas, Texas, ordinance in *Interstate Circuit v. Dallas* (1968),[40] which banned the showing of a film to persons under age 16 if it portrayed "sexual promiscuity" that would "create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted . . . [or] . . . its calculated or dominant effect on young persons is substantially to arouse sexual desire." The fatal flaw in the ordinance, according to Justice Thurgood Marshall and five other justices, was that it was unconstitutionally vague in failing to enunciate appropriately narrow standards and definitions. Two other members of the Court concurred with the result on the ground that obscene materials enjoyed First Amendment protection. In his dissent, Justice Harlan maintained, "The current approach has required us to spend an inordinate amount of time in the absurd business of perusing and viewing the miserable stuff that pours into the Court, all to no better end than second-guessing judges."[41] Justice Harlan consistently noted in his opinions—both concurring and dissenting—that no significant First Amendment concerns were involved in obscenity cases but instead individual states should be permitted to determine what sexually oriented materials should be censored and what should flourish.

Stanley v. Georgia (1969): Privacy and Obscenity

The road from *Roth* to *Miller* took a surprising turn in 1969 when the U.S. Supreme Court unanimously held that individuals could not be punished for the mere possession of obscene materials in their own home. In *Stanley v. Georgia* (1969),[42] the justices reversed the conviction of a suspected bookmaker for violating a state

statute that barred the knowing possession of obscene works, even in one's personal residence.

In an opinion, joined by five of his colleagues, Justice Marshall reversed Stanley's conviction on First and Fourth Amendment grounds, although the focus in the decision was on privacy concerns, as the Court emphasized in later cases. The police had discovered three sexually explicit 8-mm films in a desk drawer in the defendant's bedroom during the execution of a search warrant for evidence of illegal gambling. The police used a projector found nearby to view the movies and then promptly charged Stanley with possession of obscene materials. No bookmaking evidence was found.

For purposes of the case, the defendant stipulated that the films were obscene, and thus the issue became primarily one of right of privacy. All nine justices agreed that Stanley's conviction should be overturned but for different reasons (as the Court usually did in obscenity cases). According to Justice Marshall's majority opinion:

> Fundamental is the right to be free, except in very limited circumstances, from unwanted government intrusion into one's privacy. . . . Mere categorization of these films as 'obscene' is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.[43]

The Court particularly rejected Georgia's argument that a state has a right to punish individuals for possession of such materials even in their own home because exposure to obscenity leads to deviant sexual conduct and violent sexual crimes. Instead, the Court said that just as the state cannot prohibit the possession of chemistry books on the ground that it may lead to the manufacture of home-made spirits, it cannot prohibit the mere possession of obscenity on the basis that it may cause antisocial conduct.

1970 Presidential Commission on Obscenity and Pornography

There were two major developments in 1970, neither of which had any major immediate impact on the regulation of obscenity but both of which signaled the beginning of a new era in obscenity law, albeit not necessarily in line with what had been expected. First, the 1970 Presidential Commission on Obscenity and Pornography issued its report.

William B. Lockhart, the former dean of the University of Minnesota Law School, chaired the commission. He was appointed by President Lyndon Johnson. The 18-member group was charged with the mission of studying the obscenity and

pornography trade to determine its nature and scope, including its impact on adults and minors, and to make recommendations for restricting obscenity within constitutional parameters. After spending thousands of hours and more than $2 million studying the problem, the body filed a report whose content reflects the same ambiguity that was so evident on the U.S. Supreme Court. Only 12 of the 18 members joined the majority report that made the following surprising recommendations:

1. An end to all local, state and federal censorship of materials directed to consenting adults, but a continuation of strong obscenity laws governing minors, including their depiction in sexually explicit works. The commission noted that after an extensive review of studies on effects, it found scant evidence that reading or viewing sexually explicit materials lead to antisocial conduct, criminal activity or sexual deviance.
2. Enactment of strong statutes to protect children from exposure to obscene materials, primarily photos, films, and other visual representations.
3. Enactment of legislation to restrict pandering and other techniques directed at unwilling individuals including unsolicited mail and public displays.
4. A comprehensive sex education curriculum in public schools, for both elementary and secondary school students.

By the time the commission had finished its work in 1970, Richard M. Nixon had become President and the country was headed in a conservative direction. The president publicly rejected the commission's report, characterizing it as "morally bankrupt." Even the U.S. Senate moved into the picture with a resolution supported by 60 members and opposed by only 5. Public criticism was also rather intense, leading President Nixon to vow to appoint to the U.S. Supreme Court only justices who opposed relaxed regulations on obscenity.

The President had already successfully nominated conservative Associate Justice Warren Burger to replace liberal Chief Justice Earl Warren, who had stepped down in 1969. Harry A. Blackmun was then appointed in 1970 to fill the slot opened by the resignation of Associate Justice Abe Fortas after he withdrew his name for nomination as Chief Justice amid controversy.

Miller v. California (1973): Conjunctive Test of Obscenity

For the next three years, the U.S. Supreme Court issued no major decisions dealing directly with obscenity. It began a relatively short wait for a new majority coalition to emerge. President Nixon saw his wish come true as the liberal majority was replaced by a new conservative majority, including two more Nixon nominees, Lewis F. Powell and William H. Rehnquist, both of whom joined the Court in 1972.

Fourteen years later Justice Rehnquist became Chief Justice of the United States. The earlier conservative majority also consisted of Chief Justice Burger and Associate Justice Byron R. White (a conservative, at least on obscenity issues, nominated by President John F. Kennedy in 1962).

Justice Burger deftly used the authority granted him as chief justice to avoid scheduling any oral arguments in cases involving obscenity, except for two fairly minor decisions in 1971: *United States v. Reidel*[44] and *United States v. Thirty-Seven Photographs*.[45] In *Reidel*, the usual majority rejected the reasoning of a U.S. District Court judge that, because *Stanley* permitted the possession of obscene materials in a private home, the federal statute banning the mailing of obscene works to private residences, including those of consenting adults, was unconstitutional. Led by Justice White, the majority found the trial court's decision much broader than that intended in *Roth* and *Stanley*: "*Roth* has squarely placed obscenity and its distribution outside the reach of the First Amendment and they remain there today. *Stanley* did not overrule *Roth* and we decline to do so now."

The second decision concerned whether *Stanley* extended to the luggage of a tourist arriving from overseas. The same majority refused to broaden *Stanley*, ruling that no zone of privacy existed for purposes of obscenity carried in one's luggage and thus the federal statute permitting prosecution for such possession was constitutional.

By 1973 the necessary five-person majority had coalesced and the Court was in a position to utter the final word on obscenity by once and for all defining this elusive concept. On June 21, 1973, just before its 1972–1973 term ended, the Court issued *five* separate opinions that established the current test for obscenity. In fact, since that time the justices have steered clear of obscenity cases except to fine tune the *Miller* test, as it has become known. However, the justices have not avoided indecency cases.

In each of the five cases, the 5 to 4 vote line-up was the same, with the thin but nevertheless effective majority of Chief Justice Burger and Associate Justices Powell, Rehnquist, White, and Blackmun and the outnumbered but adamant minority of Associate Justices Douglas, Stewart, Marshall, and Brennan. Justice Brennan was the architect of several of the majority opinions (including *Roth*) that rejected First Amendment protection for obscenity, but in the second of the five cases, *Paris Adult Theatre I v. Slaton*,[46] Justice Brennan explained his conversion in a strongly worded, lengthy dissent:

> Our experience with the *Roth* [case] has certainly taught us that the outright suppression of obscenity cannot be reconciled with the fundamental principles of the First and Fourteenth Amendments. For we have failed to formulate a standard that sharply distinguishes protected from unprotected speech, and out of necessity, we have resorted to the *Redrup* approach, which resolves cases as between the parties, but offers only the most obscure guidance to legislation, adjudication by other courts, and primary conduct. By disposing of cases through summary reversal or denial of *certiorari* we have deliberately and effectively obscured the rationale underlying the decisions. It comes as no surprise that judicial attempts to follow our lead conscientiously have often ended in hopeless confusion.[47]

This section focuses only on the first two cases—*Miller v. California*[48] and *Paris Adult Theatre I*—because they are the most important and established the modern test for obscenity. The decisions were written by Justice Burger, who formulated a new three-prong obscenity test.

In *Miller* the Court remanded the conviction of Marvin Miller back to the state appellate court to determine the outcome of his appeal in light of the new test enunciated by the Court. Miller had been convicted of a misdemeanor for violating the California Penal Code by conducting a mass mailing campaign advertising the sale of illustrated, sexually explicit books. Five copies of the brochures were sent unsolicited to a restaurant and were opened by the owner and his mother. Inside were ads for four books (*Intercourse*, *Man-Woman*, *Sex Orgies Illustrated*, and *An Illustrated History of Pornography*) and a film titled *Marital Intercourse*. As the Court noted, "While the brochures contain some descriptive printed material, primarily they consist of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed."[49] After summarizing the background of the case, Chief Justice Burger's majority opinion quickly framed the issue:

> This case involves the application of a State's criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials. This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. . . . It is in this context that we are called on to define the standards which must be used to identify obscene material that a State may regulate without infringing on the First Amendment as applicable to the States through the Fourteenth Amendment.[50] (footnote and citations omitted)

The Court used the "unwilling recipient" principle (which even the 1970 President's Commission on obscenity endorsed) as a diving board to plunge into a new definition of obscenity. The justices could easily have upheld Miller's conviction using almost any of its previous decisions, but the majority was obviously determined to establish a new test. *Paris Adult Theatre I* presented the perfect opportunity for the Supreme Court to apply the new test in a much broader context—a public setting in which only consenting adults were involved and minors and unwilling recipients were specifically excluded. In *Miller*, the Court:

1. *Reaffirmed the holding in Roth and subsequent cases that "obscene material is unprotected by the First Amendment."*
2. *Strongly criticized the plurality opinion in Memoirs, especially the "utterly without redeeming social importance" prong:* "Thus, even as they repeated the words of *Roth*, the *Memoirs* plurality produced a drastically altered test that called on the prosecution to prove a

negative, i.e., that the material was 'utterly without redeeming social value'—a burden virtually impossible to discharge under our criminal standards of proof."

3. *Formulated a new three-prong conjunctive test for obscenity:* "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work taken as a whole appeals to the prurient interest . . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."
4. *Cited examples of what a state could define under the second prong*. These included "(a) [P]atently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."
5. *Indicated that only hard-core sexual conduct was to be punished under the new test:* "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed."
6. *Held that "obscenity is to be determined by applying 'contemporary community standards,'. . . not 'national standards.'"* In fact, the Court held that the requirement under California's statute that the jury evaluate the materials with reference to the "contemporary community standards of the State of California" was constitutional. As the Court had indicated earlier, "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City."

In a bitter dissent, Justice Douglas lambasted the majority for, in effect, making a criminal law *ex post facto* (which is impermissible under the U.S. Constitution) by devising a new test that "would put a publisher behind bars under a new law improvised by the courts after the publication." He also repeated his contention from previous obscenity cases that judges were never given the constitutional authority to define obscenity. Justice Brennan, joined by Justices Stewart and Marshall, referred in a one-paragraph dissent to his dissenting opinion in *Paris Adult Theatre I*, noting that his view in the latter substantially departed from his prior opinions.

In *Paris Adult Theatre I*, two Atlanta "adult" theaters and their owners and managers were sued in civil procedure by the local district attorney to enjoin them from showing two movies, *Magic Mirror* and *It All Comes Out in the End*.

The Georgia Supreme Court characterized the latter in its decision on appeal as "hard core pornography" leaving "little to the imagination," although by today's standards the movies would probably fall into either the R or NC-17 ratings of the Motion Picture Association of America (MPAA).

The films did feature, as the Court noted, scenes of simulated fellatio, cunnilingus, and group sex. But according to photographs presented to the trial court, which dismissed the prosecutor's complaint, the theaters' entrance (there were two theaters but they shared a common entrance) was conventional and inoffensive and displayed no pictures. Two signs proclaimed: "Atlanta's Finest Mature Feature Films" and "Adult Theatre—You must be 21 and able to prove it. If viewing the nude body offends you, Please Do Not Enter." The Georgia Supreme Court reversed the trial court decision and the U.S. Supreme Court, in a 5 to 4 vote, vacated and remanded the case back to the state supreme court for reconsideration in light of *Miller*.

The majority opinion by the Chief Justice agreed with the Georgia Supreme Court that the movie houses did not enjoy constitutional protection even though the state appellate court assumed they showed the films only to consenting, paying adults and minors were never permitted to enter. The justices made it clear that whereas it had consistently recognized a state's legitimate interest in regulating the exposure of obscenity to juveniles and nonconsenting adults, these were by no means the only legitimate state interests permitting regulation of obscene works:

> In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and passersby. Rights and interests "other than those of the advocates are involved." . . . These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself.[51] (footnotes and citations omitted)

The opinion then cited the Hill-Link Minority Report of the Commission on Obscenity and Pornography (the 1970 Presidential Commission). Both the majority and the dissenting opinions in *Paris Adult Theatre I* and *Miller* made little reference to the commission's report, although it was the most comprehensive study ever made of the obscenity problem.

In *Paris Adult Theatre I*, the majority cited a passage from the main presidential commission report acknowledging a split among medical experts over a link between exposure to pornography and antisocial conduct. The opinion also cited the commission's minority report's claim that female and male juveniles are among the "heavy users and most highly exposed people to pornography." In his dissenting opinion, joined by Justices Stewart and Marshall, Brennan included one footnoted reference to the commission's report. It claimed that no empirical research had found any evidence to date "that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal behavior [in] youth or adults."

Thus, the Presidential Commission report received little attention from the Court in its deliberations. Media and public attention was also fairly minimal except for the initial flurry over the rejection of the report by President Nixon and the Senate.

In his fairly brief separate dissenting opinion, Justice Douglas commended Justice Brennan in his effort to "forsake the low road" and join the side of the dissenters. According to Justice Douglas, there is "no constitutional basis for fashioning a rule that makes a publisher, producer, bookseller, librarian, or movie house operator criminally responsible, when he fails to take affirmative steps to protect the consumer against literature, books, or movies offensive to those who temporarily occupy the seats of the mighty" (footnote omitted).[52]

Justice Brennan's dissent is well worth reading in its entirety even by those who vehemently disagree with him. Substantially longer than the majority opinion, it traces the 16-year history of the Supreme Court's attempts to define obscenity and eloquently describes what many jurists consider to be the four main options in dealing with obscenity:

1. *Draw a new line between protected and unprotected speech while still allowing states to suppress all unprotected materials.* This would essentially take the issue of obscenity out of federal hands and put it exclusively in the regulatory hands of the states.
2. *Accept the new test enunciated by the Court.*
3. *Leave enforcement primarily in the hands of juries with the Supreme Court and other appellate courts intervening only "in cases of extreme departure from prevailing standards."*
4. *Adopt the view that the First Amendment bars the suppression of any sexually oriented expression, as advocated by Justices Black and Douglas.*

Justice Brennan then went on to advocate a fifth option:

> *Allow sexually oriented materials to be controlled under the 1st and 14th Amendments only in the manner of their distribution and only when there are strong and legitimate state interests such as the protection of juveniles and nonconsenting adults.* In other words, consenting adults would make their own choices about what to see and read without interference from government.

Justice Brennan opted for the last approach; he felt it had flaws but that they were less serious and obtrusive than those of the other options.

Aftermath of *Miller* and *Paris Adult Theatre I*

Relatively few obscenity cases have been granted certiorari since *Miller et al.*, and the limited number of decisions that have been handed down contained no major surprises. In the year following *Miller*, the Court issued two obscenity decisions on the same day.

Hamling v. U.S. (1974)[53] tied a couple of the many loose ends left in *Miller*. The Court affirmed the federal obscenity convictions of four individuals and two corporations for mailing approximately 55,000 copies of a brochure throughout the country advertising *The Illustrated Presidential Report of the Commission on Obscenity and Pornography*. The jury was unable to reach a verdict on charges that the illustrated report itself was obscene. The single-sheet brochure (printed on both sides) included:

> a full page splash of pictures portraying heterosexual and homosexual intercourse, sodomy and a variety of deviate sexual acts. Specifically, a group picture of nine persons, one male engaged in masturbation, a female masturbating two males, two couples engaged in intercourse in reverse fashion while one female participant engages in fellatio of a male; a second group picture of six persons, two males masturbating, two fellatrices practicing the act, each bearing a clear depiction of ejaculated seminal fluid on their faces; two persons with the female engaged in the act of fellatio and the male in female masturbation by hand; two separate pictures of males engaged in cunnilinction; a film strip of six frames depicting lesbian love scenes including a cunnilinguist in action and female masturbation with another's hand and a vibrator, and two frames, one depicting a woman mouthing the penis of a horse, and a second poising the same for entrance into her vagina.[54]

The reverse side of the brochure contained an order form and several paragraphs touting the "research" value of the book and chiding "Mr. President" for suppressing the report. The Ninth Circuit U.S. Court of Appeals had no difficulty affirming the convictions nor did the U.S. Supreme Court. The primary issue was what rules of law would govern obscenity convictions, like this one, that had been decided in trial and lower appellate courts before *Miller* was handed down.

The 5 to 4 majority opinion authored by Justice Rehnquist held (a) that jurors in federal obscenity cases can draw on the knowledge of the local community in determining contemporary community standards; (b) that jurors can, if they wish, ignore the testimony of experts because they are themselves the experts ("average person"); and (c) that the prosecution is required to show only that a defendant had actual knowledge of the contents in order to prove *scienter*, not that the defendant knew the materials were obscene.

Billy Jenkins v. Georgia (1974): Mere Nudity Is Not Enough

In the second case, *Billy Jenkins v. Georgia* (1974),[55] the Court reversed the conviction of a theater operator accused of distributing obscene materials by showing the film *Carnal Knowledge* at an Albany, Georgia, drive-in. In 1972 (before *Miller* was decided), law enforcement officers seized the film while Jenkins was showing it and charged him with violation of state obscenity statutes. Two months later, a jury convicted him. He was fined $750 and given 12 months' probation.

In a split decision, the state supreme court affirmed the conviction while acknowledging the definition of obscenity in the state statute was "considerably more restrictive" than the new test set forth in *Miller*, which had recently been handed down. In an opinion written by Justice Rehnquist, the Court unanimously overturned the trial court decision. The Court considered it relevant that the film had received favorable reviews from critics and was on many "Ten Best" lists for 1971. Its stars include Ann Margret, Candice Bergen (later on CBS TV's "Murphy Brown" and then a featured performer on NBC's "Law & Order" and later, on ABC's "Boston Legal") and Art Garfunkel (of the Simon and Garfunkel duo). According to the majority opinion:

> Our own viewing of the film satisfies us that 'Carnal Knowledge' could not be found under the *Miller* standards to depict sexual conduct in a patently offensive way. . . . While the subject matter of the picture is, in a broader sense, sex, and there are scenes in which sexual conduct including 'ultimate sex acts' is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. There is no exhibition 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* standards.[56]

These two cases provide appropriate examples of what the Court had in mind for protected versus unprotected works when it fashioned the *Miller* test. The *Hamling* brochure was clearly hard core sexual content, but *Carnal Knowledge* was far from patently offensive.

The *Jenkins* case is a frightening illustration of how suppressive prosecutors and juries can be in judging works they deem offensive. No doubt, there are many more examples of censorship of constitutionally protected materials that never sought redemption from what some critics deemed "the High Court of Obscenity."

Child Pornography

The courts have recognized children as a protected class for a long time and thus worthy in some situations of stronger protection by the government than that warranted for adults. Only within the last few decades have both Congress and the courts made a significant effort to protect children from exploitation such as child labor and sexual abuse. As late as 1918 the U.S. Supreme Court held that Congress lacked the authority under the Constitution's Commerce clause to ban the interstate transportation of goods made by children under 14 years of age.[57] Two decades later, the Court reversed the decision, noting that the 1918 decision "has not been followed" and "should be and is now overruled."[58]

Eventually, the concern for protecting children broadened to include preventing them from having access to pornography and stopping the creation and dissemination of child pornography or "kiddie porn," as it is popularly known. During the mid-1970s several states and the U.S. Congress responded to public outrage over the perceived proliferation of child pornography as detailed in various media reports.

New York enacted one of the toughest statutes[59] in the country in 1977, the same year a new federal statute took effect, the "Protection of Children against Sexual Exploitation Act of 1977."[60] Both statutes provided stiff fines and prison sentences for individuals convicted of using minors to engage in sexually explicit acts for still and moving image cameras of any type.

Paul Ira Ferber, owner of a Manhattan store, was convicted in a New York trial court on two counts of violating child pornography laws for selling to an undercover police officer two films showing young boys under the age of 16 masturbating. The state's highest court, the New York Court of Appeals, reversed the conviction on the ground the state statute was under-inclusive and over-broad.

In *New York v. Ferber* (1982),[61] the U.S. Supreme Court reversed and remanded the case to the state Court of Appeals. In the 6 to 3 decision written by Justice White, the Court said the constitutional standards for child pornography are not the same as those for adult materials. According to the justices, states could impose stricter bans on materials involving the sexual depiction and conduct of minors and ban such materials even if they did not meet the legal definition of obscenity in *Miller*. The Court noted that 47 states already had such laws and that the regulations could go beyond *Miller* because "the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." However, the Court did say that criminal liability may not be imposed unless *scienter* is shown on the part of the defendant.

The U.S. Supreme Court answered a question left in the air after the *Ferber* decision: *Does the Stanley bar against prosecution for possession of obscene materials in the privacy of one's home cover child pornography?* In *Ferber* the Court held that the same standards did not apply for child pornography as for adult materials because children are a protected class and "the use of children as subjects of pornographic materials is harmful to the physiological, emotional and mental health of the child."[62]

In *Osborne v. Ohio* (1990),[63] the Court upheld 6 to 3 a state kiddie porn statute that included penalties for the private possession of child pornography. In the decision written by Justice White, who was joined by Chief Justice Rehnquist and Associate Justices Blackmun, O'Connor, Scalia, and Kennedy, the Court said:

> The threshold question in this case is whether Ohio may constitutionally proscribe the possession and viewing of child pornography, or whether as Osborne argues, our decision in *Stanley v. Georgia* . . . compels the contrary result. . . . We find this case distinct from *Stanley* because the interests underlying child pornography prohibitions far exceed the interests justifying the Georgia law at issue in *Stanley*. (citation omitted)[64]

The majority opinion went on to note, "Given the importance of the State's interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels of the distribution chain."[65]

The case began when 61-year old Clyde Osborne was prosecuted after police searched his home on a tip and found an album containing four sexually explicit

photos of a boy believed to be 13 or 14 years old. The state statute, which the Court upheld, specifically banned the possession of lewd material or material that focused on the genitals of a minor. The law also forbade the possession or viewing of "any material or performance that shows a minor" nude. There were exceptions in the statute for photos taken by parents and for photos with an artistic, medical or scientific purpose. Osborne was sentenced to six months in prison and fined $100. He was granted a new trial by the U.S. Supreme Court on the ground that the jury that had convicted him had not been properly instructed. However, Ohio's statute stood intact because it met constitutional muster.

A concern related to child pornography has been how to keep sexually oriented materials out of the hands of minors. State and local governments have enacted statutes or ordinances requiring all businesses that sell such magazines, books, videos, and other works to place them where children cannot see or peruse them. Virginia had such a statute, challenged as unconstitutional by the American Booksellers Association. In *Virginia v. American Booksellers Association* (1988),[66] the U.S. Supreme Court remanded a ruling by the Fourth U.S. Circuit Court of Appeals that the state statute was unconstitutionally over-broad back to the court on the ground that the lower appellate court's decision was not supported by the record.[67] On remand,[68] the circuit court ruled the statute did not violate the First and Fourteenth Amendments because, as construed by the state supreme court, it penalized only businesses that knowingly permitted or failed to act reasonably to prevent minors from gaining access to such materials and only when the works lacked serious literary, artistic, political or scientific value "for a legitimate minority of normal, older adolescents." Thus, according to the federal appellate court, the statute gave establishments adequate notice of what was prohibited. The U.S. Supreme Court denied certiorari on the American Booksellers Association's appeal of the Fourth Circuit decision.[69]

In 1996 Congress passed the Child Pornography Prevention Act,[70] which broadened the definition of child pornography to include computer-simulated images created by a process known as "morphing." The Act was challenged as unconstitutional in federal court by various civil liberties organizations and the adult-trade industry, but in *Ashcroft v. Free Speech Coalition* (2002)[71] the U.S. Supreme Court held in a 6 to 3 opinion that two provisions of the Act, §2256(8)(B) and §2256(8)(D), violated the First Amendment because they were over-broad. The first section banned a wide range of sexually explicit images, including virtual child pornography ("morphing") and images that appeared to depict minors, including the use of youthful looking adults or computer images. It did not matter whether the images actually portrayed minors. What mattered was whether the images appeared to be of minors. The second section was a pandering provision that focused on how the work was promoted, more specifically, whether the promotion "conveys the impression" that it contained sexually explicit scenes of minors even if there were no such scenes. According to the majority opinion written by Justice Kennedy:

> Our society, like other cultures, has empathy and enduring fascination with the lives and destinies of the young. Art and literature express the vital interest

> we all have in the formative years we ourselves once knew, when wounds can be so grievous, disappointment so profound, and mistaken choices so tragic, but when moral acts and self-fulfillment are still in reach. Whether or not the films we mention [the Court specifically mentioned "Traffic" and "American Beauty"] violate the CPPA, they explore themes within the wide sweep of the statute's prohibitions. If these films, or hundreds of others of lesser note that explore those subjects, contain a single graphic depiction of sexual activity within the statutory definition, the possessor of the film would be subject to severe punishment without inquiry into the work's redeeming value. This is inconsistent with an essential First Amendment rule: the artistic merit of a work does not depend on the presence of a single explicit scene.[72]

The Court cited both *Ferber* and *Miller*, noting the CPPA was inconsistent with *Miller* because under the Act, the government did not have to demonstrate the materials appealed to prurient interests nor that they were patently offensive. The Court said, unlike *Ferber*, no direct link could be demonstrated between the materials and the sexual abuse of children in this case. The CPPA banned speech that recorded no crime and created no victims in its production, according to the Court.[73] The Court also rejected the government's other arguments, including the point that the Act was needed to prevent pedophiles from using virtual pornography to trap children online, noting this argument "runs afoul of the principle that speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it."

In response to the case, the government established a national database to help trace missing children and assist in prosecutions. In an effort to protect privacy, the database does not include the names of victims but instead lists law enforcement personnel who can testify that victims are real children. The database is maintained by the Customs Cybersmuggling Center with the cooperation of the National Center for Missing and Exploited Children.[74] In 1997 an Oklahoma district judge found that the 1979 Oscar-winning film, *The Tin Drum*, based on the classic novel by Gunter Gräss, was obscene under Oklahoma law because it depicts a young boy having oral sex with a teen-age girl. The movie and novel focus on the trauma suffered by a young boy in Nazi Germany during World War II. The case arose after Oklahomans for Children and Families, an anti-pornography organization, notified police that the R-rated film was in the local public library and in six local video rental stores. Police confiscated the one library copy as well as copies from the video outlets.[75] They also served warrants on three individuals who had copies in their homes.

Syndicated columnist Leonard Pitts, Jr. criticized the decision, particularly for its perceived chilling effect on the First Amendment. "I find myself reminded that the biggest problem with freedom of speech is its operating assumption: that we should risk being capsized in swill in order that we might occasionally be blinded by light."[76] Unusual cases crop up from time to time such as the conviction of an inmate in a Minnesota prison for selling child pornography over the Internet. He had accessed the Internet through a computer at the prison.[77] In both *Los Angeles v. Alameda Books*

and *Ashcroft v. Free Speech Coalition,* the U.S. Supreme Court held 7 to 2 that certain provisions of the Child Pornography Prevention Act (CPPA) were too broad and therefore unconstitutional. Specific issues regarded the virtual depiction of children far reaching without the actual use of real children.[78] In addition, in *Ashcroft v. American Civil Liberties Union* (2002), the U.S. Supreme Court determined that the nature of the material as provided in the Child Online Protection Act (COPA) did not mean the statute was too broad. The debate over the availability, extent, and nature of child pornography over the Internet continues.[79]

Zoning and Other Restrictions

Zoning is one of the most effective ways local governments have discovered for regulating obscenity. The courts, including the U.S. Supreme Court, have generally backed authorities in their efforts to use zoning laws as a means of restricting adult stores and theaters to certain areas and barring them from other areas, so long as they do not impose an absolute ban. For example, in *City of Renton v. Playtime Theatres* (1986),[80] the Supreme Court held that a Renton, Washington zoning ordinance restricting so-called adult theaters from operating within 1,000 feet of any residential zone, single or multiple family housing, school, park, or church was constitutional. According to the 7 to 2 opinion by Justice Rehnquist, the law represented a legitimate state response to the problems generated by these establishments and did not infringe on First Amendment and Fourteenth Amendment freedoms even though it restricted the showing of non-obscene plays, films, and printed works. Ten years earlier, the Court had upheld a similar zoning ordinance in Detroit, noting that the ordinance did not totally ban such businesses but merely restricted them to certain areas of the city. Both ordinances, the Court said, were reasonable time, place, and manner restrictions permissible under the Constitution.

In a second case, *Arcara v. Cloud Books* (1986),[81] the U.S. Supreme Court gave the constitutional nod of approval to a New York state statute under which an adult bookstore was prosecuted and then shut down. An undercover investigation by the local county sheriff's department allegedly revealed illegal sexual activities, including prostitution and lewdness, taking place in the store. One sheriff's deputy testified that he witnessed customers masturbating, fondling one another, and performing fellatio as well as prostitutes soliciting sex.

A 6 to 3 opinion by Chief Justice Burger compared the situation to the draft card burning in *U.S. v. O'Brien* (1968),[82] which the Court asserted is a form of expressive conduct. Furthermore, the majority contended, sexual activities such as these have even less protection than draft card burning: "Unlike . . . symbolic draft card burning . . . the sexual conduct carried on in this case manifests absolutely no element of protected expression."[83] Of course, as dissenting Justices Blackmun, Brennan, and Marshall pointed out, the store itself was closed to prevent the activities by imposing liability on the owners rather than simply punishing the conduct itself.

In 1996 a New York City trial court judge ruled that the city's zoning law, which restricted businesses selling sexually-oriented materials to specific parts of the city, did not violate the First Amendment.[84] One of the visible results of the ruling was that most of the formerly prominent adult businesses in the Broadway theater district moved.

Attorney General Commission on Pornography Report

The event calling the most attention to the pornography issue in the 1980s was the release, amid considerable fanfare, of the 1,960-page report of a $500,000 study entitled *The Attorney General Commission on Pornography Report*.[85] The 11-person commission, which had been appointed by President Ronald Reagan's Attorney General, Edwin Meese, a year earlier, made 92 recommendations, many of which were opposite of those of the 1970 presidential commission. With two members dissenting, the commission recommended or endorsed:

1. Stronger state and federal obscenity statutes
2. A ban on all obscene shows on cable television
3. A ban on "dial-a-porn" telephone services
4. Increased involvement of citizen groups against businesses that sell, distribute, or produce sexually explicit materials, including picketing and boycotting
5. Creation of a high-level U.S. Department of Justice task force on obscenity
6. New laws permitting the federal government to confiscate the assets of businesses that violate obscenity laws
7. Prosecution of producers, actors, and actresses involved in pornographic films under prostitution laws
8. Enactment of legislation making a second-offense arrest under obscenity laws a felony rather than a misdemeanor.[86]

Many criticisms were leveled at the group from organizations such as the American Civil Liberties Union, First Amendment societies, and professional journalism associations. These groups contended that most of the recommendations would be unconstitutional if carried out and that the commission produced little scientific evidence to support its conclusion that substantial exposure to sexually violent materials can cause antisocial acts of sexual violence and possibly unlawful acts of sexual violence.[87]

Commission Chair Henry Hudson acknowledged when the report was released that the commission had relied heavily on common sense and the testimony of expert witnesses and citizen groups rather than scientific studies. The two dissenting members accused the commission of bias and distortion, noting that most of the more than 200 witnesses were individuals and groups opposed to pornography such as police and anti-porn leaders.[88]

Some of the recommendations of the commission have been implemented such as tougher obscenity statutes, but others have not enjoyed widespread public support. The commission recommended that federal and state government step up obscenity prosecutions through the use of RICO (Racketeering Influenced and Corrupt Organizations) statutes. In 1970 Congress passed the RICO provision as part of the Organized Crime Control Act.[89] It was amended in 1984 to include obscenity convictions, which gave the federal government the chance to seek stiffer fines and prison sentences against distributors and sellers of pornography as well as a forfeiture of assets when a pattern of racketeering could be demonstrated in court.[90]

The statute was successful in cracking down on interstate trafficking in porn. In *Fort Wayne Books v. Indiana* (1989),[91] the Court ruled that a state RICO-type statute was not unconstitutionally vague in its language permitting the prosecution of obscenity as a form of racketeering or organized crime, but held that pretrial seizure of allegedly obscene materials was a violation of the First Amendment. It was, in effect, prior restraint.

The case arose when two adult bookstore owners were separately charged with violating Indiana's RICO statute. One of the defendants challenged the statute as unconstitutional on the ground that it permitted seizure of his entire store inventory. The Court agreed that his assets could not be seized unless rigorous safeguards laid out in *Freedman v. Maryland* and a long line of other cases were employed, but it did not strike down the statute. According to the Court, "While a single copy of a book or film may be seized and retained for evidentiary purposes based on a finding of probable cause, books or films may not be taken out of circulation completely until there has been a determination of obscenity after an adversary hearing."[92]

The message of the Court is clear: books, films, magazines, and other forms of expression must be treated as though they have First Amendment protection until a determination has been made by a court that they are obscene. Thus prosecutors cannot seize these materials in the same manner in which they confiscate presumably illegal drugs, weapons, and other items.

In 1993 the Court upheld the constitutionality of the federal RICO statute in obscenity prosecutions. In *Alexander v. United States*,[93] the owner of several adult-oriented businesses had been convicted of selling seven obscene items at his stores in violation of both the federal RICO act and federal obscenity statutes. The U.S. District Court had not only given the defendant a prison term and fined him but also ordered him to forfeit his businesses and the approximately $9 million he had earned in profits. The Supreme Court distinguished this case from *Fort Wayne Books,* noting that in this case the forfeiture had occurred after required procedures had been followed. Interestingly, the Court remanded the case back to the lower appellate court to determine whether the forfeiture, fine, and prison term combined had violated the Eighth Amendment prohibition against excessive fines and cruel and unusual punishments.

One other important recommendation of the commission that eventually saw the light of day was the establishment of a federal obscenity task force. In 1987 Attorney General Edwin Meese set up a National Obscenity Enforcement Unit within

the Department of Justice, and that unit was involved in a number of prosecutions against alleged pornographers.

Occasionally, an obscenity decision by the U.S. Supreme Court provides a surprise. An example is *Pope v. Illinois* (1987).[94] The case involved the prosecution of two adult bookstore clerks who sold magazines to Rockford, Illinois, detectives which the prosecution claimed were in violation of the state obscenity statute. When the judge instructed the jury, he faithfully reviewed the *Miller* three-prong conjunctive test. But he told jurors that in applying the "LAPS" prong (Does the material in question lack serious literary, artistic, political, or scientific value?), they should do so "by determining how it would be viewed by ordinary adults in the whole state of Illinois." In other words, they were to apply a state standard in determining the "LAPS" value. After separate trials, defendants challenged their convictions on grounds that the Illinois statute was a violation of the First Amendment because it invoked local or state standards in determining "LAPS."

In a 5 to 4 decision written by Justice White, the Court agreed with the challengers and remanded the cases back to the state appellate court. The Court held that the "LAPS" determination should be made based on a "reasonable person" and thus invoke a national or objective standard:

> Just as the ideas a work represents need not obtain majority approval to merit protection, neither, insofar as the First Amendment is concerned, does the value of the work vary from community to community based on the degree of local acceptance it has won. The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material taken as a whole.[95]

The justices emphasized that *Miller* was never intended to protect only works in which the majority would find value but instead to provide a First Amendment shield for materials for which a minority would ascribe value. With application of the reasonable person standard, the Court felt minority views would be better protected than with the use of local community standards.

The defendants in *Pope* were not entirely off the hook. The Court indicated that the state appellate court was to review the case and determine beyond a reasonable doubt whether the erroneous instruction by the judge affected the outcomes in trials. If the mistake were simply a "harmless error," the convictions should stand upon remand, according to the majority opinion.[96]

Examples of Obscenity Prosecutions

The long-term impact of the *Miller* decision has been exactly what the U. S. Supreme Court intended with its three-prong test. Different jurisdictions have shown different degrees of tolerance of sexually explicit materials. Some cities and towns use selective prosecution to rid themselves of adult bookstores and theaters.

Communities tolerate the availability of such works, permitting local video stores, for example, to rent and sell Walt Disney's *Cinderella* in the Family section and XXX-rated *Nancy Nurse* and *Turn up the Heat* in another section accessible only to adults. The latter two films were being shown at an adult theater in Sarasota, Florida in 1991, when actor Paul Reubens, also known as "Pee-wee Herman," was arrested and later pleaded no contest to a charge of indecent exposure for masturbating during night-time showings.[97]

Two other examples from the more recent past also illustrate the complexity and inconsistencies of obscenity prosecutions. In the first case, U.S. District Court Judge Jose Gonzalez of the Southern District of Florida ruled in a 62-page decision that an album entitled "As Nasty as They Wanna Be" by the once highly controversial rap group 2 Live Crew was obscene under Florida law. This was a case of applying the standards established in *Miller*.[98]

The civil suit was prompted by a county circuit court judge's ruling that there was probable cause to believe the album was obscene. The county judge was acting on a request from Broward County Sheriff Nick Navarro that he be granted authority to arrest shopkeepers who continued to sell the album. More than 1.7 million copies had been purchased nationwide before the court's decision. The sheriff was acting, he said, based on complaints from local citizens. After the county judge's probable cause ruling, the sheriff and his deputies distributed copies of the ruling to record stores throughout the county and threatened to arrest anyone who sold the album. Attorneys for 2 Live Crew filed suit against the sheriff after sales of the record in the area were effectively stopped. The rap group sought a declaratory judgment that the album was not obscene and a restraining order to prevent the sheriff from stopping sales.

U.S. District Court Judge Gonzalez ruled the music was obscene after a trial in *Skyywalker Records, Inc. v. Navarro*.[99] According to the judge, both the *ex parte* application from the sheriff and the county judge's order itself violated the due process standards for prior restraint established in *Freedman v. Maryland*. He went on to declare the album obscene because it appealed to prurient interests, was patently offensive as defined by state law, and lacked serious literary, artistic, political, or scientific value. Judge Gonzalez did not prohibit sale of the album nor did he find there was any criminal liability because the decision was based on a civil suit. According to the district court judge:

> It [the album] is an appeal to 'dirty' thoughts and the loins, not to the intellect and the mind. . . . The recording depicts sexual conduct in graphic detail. The specificity of the descriptions makes the audio message analogous to a camera with a zoom lens, focusing on the sights and sounds of various . . . sex acts. It cannot be reasonably argued that the violence, perversion, abuse of women, graphic descriptions of all forms of sexual conduct, and microscopic descriptions of human genitalia contained in this recording are comedic art.[100]

The decision was the first time a federal judge declared a record album or CD obscene. Although the main impact of the decision, as expected, was a substantial

increase in sales of the album around the country, at least one record shop owner was arrested the next day after the judge's decision. E-C Records proprietor Charles Freeman was arrested by six deputies of the Broward County Sheriff's Department after he sold the album to an undercover officer. He was handcuffed, taken to jail, and charged with a misdemeanor of distributing obscene material.[101]

Four days after the ruling, Broward County Sheriff's deputies arrested, as they had promised after the judge's ruling, two members of 2 Live Crew after the band performed an adults-only show at a Hollywood, Florida, nightclub.[102] Like Charles Freeman, the band members faced a maximum penalty of $1,000 and/or a year in jail. A third member of the four-person band was arrested and charged later. The band members went on trial in October 1990, and a jury acquitted all three members after a two-week trial in which much of the evidence consisted of a poor videotape recording of the performance. The jury deliberated only about two hours before reaching its verdict.[103]

The controversy eventually died down, but, ironically, a band known as Too Much Joy was arrested in August of the same year by Broward County deputies. It played songs from the 2 Live Crew Album to 350 people in a Hollywood, Florida, nightclub to protest the federal district court decision declaring the album obscene.[104] In May 1992 the Eleventh Circuit U.S. Court of Appeals overturned the district court ruling. A three-judge panel of the appellate court ruled that Sheriff Navarro had not proven that the "As Nasty as They Wanna Be" recording met a legal definition of obscenity established in *Miller*.[105]

Interestingly, the 2 Live Crew album carried a warning label as part of a voluntary uniform label system unveiled by the Recording Industry Association of America (RIAA). RIAA members produce more than 90 percent of the records, tapes, and CDs sold in the country.[106] The system is strictly voluntary, although most recording companies have complied. The warning labels are placed on music products that contain material believed objectionable to children such as lyrics dealing with sex, violence, drugs, and bigotry.

Neither RIAA nor the National Association of Recording Merchandisers (NARM) publicly supported 2 Live Crew in its civil suit.[107] Two weeks before the 2 Live Crew acquittals, the Contemporary Arts Center of Cincinnati, Ohio, and its director, Dennis Barrie, were found not guilty of charges that they pandered obscenity when the gallery featured a controversial exhibit of photographs by the late Robert Mapplethorpe. The jury also cleared the defendants of two charges of exhibiting nude photos of children. The center and its director were indicted by a Hamilton County grand jury the same day the exhibit opened.

The 20-year retrospective of the acclaimed photographer's work, entitled "The Perfect Moment," consisted of 175 photographs, including five homosexual pictures and two of children. One of the five homosexual pictures includes a male urinating into the mouth of another male, and the others are of various sex acts. One of the photos is of a very young girl sitting on a porch with her skirt up to reveal her genitals, and the other is of a young boy standing nude on a couch. Most of the other photos in the display were of flowers and nude male and female figures.

According to press reports, the gallery spent $350,000 in legal expenses to defend itself at the two-week jury trial, and the city spent $14,550 in the prosecution.[108] More than 40,000 individuals paid to see the show during its first three weeks and another 40,000 reportedly saw it before it ended its run. In contrast to the 2 Live Crew case, First Amendment groups from around the country supported the defendants in the Cincinnati trial. The exhibit was able to continue because the center successfully sought an injunction from a U.S. District Court judge to bar city and county law enforcement officers from confiscating or otherwise interfering with the exhibit until a judicial determination had been made that the photographs were obscene.[109]

In 1997, 22-year-old Andrew Love was arrested in an Ocala, Florida, mall parking lot and charged with violating the state's obscenity statute for wearing a T-shirt promoting the British band, Cradle of Filth. The T-shirt pictured a topless nun masturbating. At trial, Love's attorney argued the shirt was not obscene because it was protected political commentary. The prosecutor claimed that, as required under Florida law to be obscene, the average person would find that the T-shirt: (1) appealed to a prurient, morbid, or shameful interest in sex, applying contemporary community standards, (2) depicted sexual material in a patently offensive way, and (3) when taken as a whole, was devoid of any serious literary, artistic, political or scientific value. The six-person jury acquitted Love.[110]

There is probably no modern figure more closely associated with obscenity than *Hustler* magazine publisher Larry Flynt, who was the subject of director Milos Forman's 1997 movie, *The People v. Larry Flynt*. The publisher frequently reminds anyone who will listen that if the First Amendment protects a "scumbag" like him, it protects everyone.[111] In *An Unseemly Man: My Life as Pornographer, Pundit, and Social Outcast,* Flynt, who presides over a multimillion dollar, sexually-oriented publishing empire, admits to having sex with a chicken when he was nine. While conceding Flynt's First Amendment right to protest, feminist Gloria Steinem, founding editor of *Ms. Magazine* and a Flynt critic, argued in the *New York Times* that if he had published "the same cruel images even of animals [that he published of women], the movie [*The People v. Larry Flynt*] would never have been made."[112]

Flynt was convicted in Hamilton County, Ohio, of 15 counts of obscenity, including pandering, in 1977. His conviction was later reversed by an appeals court. He was never retried, but in April 1998 he was indicted on 15 felony counts in the same county for selling 16 sexually explicit videos at his Hustler store in Cincinnati. The charges included nine counts of pandering obscenity, three counts of disseminating materials harmful to minors, two counts of conspiracy to engage in a pattern of corrupt activity, and one count of engaging in such activity.[113]

Informed critics are quick to point out that the company selling more X-rated films every year than Larry Flynt and *Playboy*, more than $200 million annually out of an estimated $10 billion, is DirecTV which General Motors sold to Rupert Murdoch's News Corp. in 2003. Republican presidential candidate Mitt Romney, who has spoken out strongly against pornography in this country, was harshly criticized in 2007 for not attempting to get the Marriott Hotel chain out of the pay-per-view hotel movie distribution business. Romney served on the Marriott board for nine

years, including as chair of the audit committee. Like most major hotels, Marriott makes sexually explicit movies available via patron TV sets.

Obscenity Versus Indecency

The U.S. Supreme Court and other appellate and trial courts have not confined their deliberations to obscene speech when it comes to sexually oriented or other offensive materials. They have also tackled *indecency*. From a legal perspective, there is one major difference between *indecency* and *obscenity*. The latter must appeal to prurient interests, but the former need not. Both usually involve nudity and sex in some form, although their impact on the average person is different, according to the courts. There is one other major difference: indecent speech enjoys constitutional protection in some contexts, but obscenity can never count on the First Amendment.

Some examples of speech that could be considered indecent but are very likely not obscene appear in Madonna's documentary film, *Truth or Dare*. The film shows Madonna exposing her breasts, Madonna simulating oral sex with a bottle, two male dancers kissing one another, a friend of the singer discussing a lesbian relationship, Madonna simulating orgasm from masturbation during a concert, and profanity. A media critic might argue that the "material girl" has changed her tune, but her R-rated movie would never pass the *Miller* conjunctive test because it might be judged to hold some literary value and does not appeal to prurient interests.[114]

Indecency on Cable Television

Cable television outlets face severe criminal penalties under both federal and state statutes if they carry obscene programming. The Cable Television and Consumer Protection and Competition Act of 1992 contained several provisions regarding obscene and indecent programs.[115] These include a provision allowing cable operators to deny access to anyone seeking to lease a channel to carry programming that the operator "reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." This phrasing is very much in line with the FCC's definition of indecency in broadcasting.

The Act provides for civil and criminal liability for cable operators who carry obscene programs on public, educational and governmental (PEG) and leased access channels. The FCC was directed under the Act to establish rules. The rules (1) require cable operators who carry indecent programming on leased access channels to block the channels unless the consumer requests in writing that the channel not be blocked, and (b) allow cable operators to ban "obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct."

The Commission began the appropriate rule making proceedings shortly after the Act took effect, and in June 1995 the U.S. Court of Appeals for the D.C. Circuit in a 6 to 4 decision upheld the indecency and obscenity provisions of the Act and the FCC's implementation of them.[116] The circuit court reasoned that there was no

violation of the First Amendment because there was no absolute ban on indecent programs and cable operators had a choice on whether to block such programming. On appeal, the U.S. Supreme Court granted certiorari in 1996.

In *Denver Area Educational Telecommunications Consortium v. Federal Communications Commission* (1997),[117] the Supreme Court affirmed in part and reversed in part the D.C. Circuit decision. There were enough concurring and dissenting opinions in the case to make one's head swim, pointing to the extreme difficulty justices have in determining the standards that should apply to indecent content on cable television. Justice Breyer, joined by Justices Stevens, O'Connor, Kennedy, Souter, and Ginsburg, held that Section 10(b) violated the First Amendment. That section applies only to leased access channels and requires cable operators to confine any "patently offensive" programming to a single channel and to automatically block the programming unless a subscriber makes a written request that the channel not be blocked.

The Court said this provision was not narrowly tailored enough to achieve the government's legitimate objective of protecting children from such content. According to the Court, there were other less restrictive means of protecting minors such as V-chips and lockboxes that allow parents to selectively block access.

In a 7 to 2 vote, the Court upheld the constitutionality of Section 10(a), which permits cable operators to refuse to carry programming on commercially leased access channels if the cable company "reasonably believes" the programming "depicts . . . sexual activities or organs in a patently offensive manner." Unfortunately, a majority of the justices could not agree on the rationale for upholding the provision.

In a closer vote (5 to 4), the Court ruled that Section 10(c), which allows cable operators to refuse to carry what they believe is indecent programming on local PEG channels, is unconstitutional. Once again, there was no agreement among the majority regarding why the provision violated the First Amendment.

The case did little to resolve the issue of how far the government can go in regulating indecency on cable television. About all the justices could agree on are that the need to protect children from such programming is a compelling government interest and that requiring cable companies to block indecent programming on local access channels is impermissible when the consumer has to take the initiative to unblock the programming. In *U.S. v. Playboy Entertainment Group, Inc.*, the U.S. Supreme Court ruled that Section 505 of the Telecommunications Act of 1996 was unconstitutional because it was not the least restrictive means of addressing children's exposure to sexually explicit programming on cable. The Court applied the strict scrutiny test, as the court had done in *Sable Communications v. FCC* (1989) regarding indecent phone sex.

Indecency on the Internet

Even when Bill Clinton was President and he signed into law the Telecommunications Act of 1996, one of the provisions of the statute, the Communications Decency Act (CDA),[118] was immediately challenged in the courts. Under the Act, anyone who

uses a computer to transmit indecent material faces possible imprisonment of up to two years and fines up to $500,000. At a Freedom Forum seminar a month after the law took effect, U.S. Senator Patrick Leahy (D-Vt.), who had voted against the measure, characterized the CDA as "unconstitutional."[119]

Because Congress knew the provision was likely to be challenged, it included a provision in the CDA that the federal courts would grant expedited review. The U.S. District Court for the Eastern District of Pennsylvania quickly granted a temporary restraining order that barred enforcement of the CDA, pending appellate court review.[120] After hearing oral arguments and reviewing reams of documents filed in the case, a special three-judge panel headed by Chief Judge Sloviter of the Third Circuit U.S. Court of Appeals unanimously agreed to granting a preliminary injunction requested by the American Civil Liberties Union, the American Library Association, several on-line services, the Society of Professional Journalists, and 50,000 Internet users.[121] Defendants in the case included U.S. Attorney General Janet Reno and the Department of Justice. In its decision, the court viewed the Internet as more analogous to the telephone or to the print media than the broadcast media and pointed to the fact that one person can literally speak instantaneously to millions of people around the world.

According to the separate opinion of one member of the panel, District Judge Stewart Dalzell, "Any content-based regulation of the Internet, no matter how benign the purpose, could burn the global village to roast the pig." Two provisions of the Act were challenged—one dealing with "indecent" communication (which the Act did not define)[122] and the other dealing with "patently offensive" communication, which was defined in traditional terms similar to that in broadcasting as "measured by contemporary community standards . . . [the depiction or description of] . . ., sexual or excretory activities or organs."[123]

To obtain a preliminary injunction, which would be effective only until overturned or upheld on appeal, a plaintiff must show "a reasonable probability of eventual success in the litigation" and that the person or entity would suffer irreparable harm if the law was enforced. According to the panel, the plaintiffs had demonstrated this. The U.S. Supreme Court heard oral arguments in the appeal on March 19, 1997. On June 26, its next-to-last day for business for the session, the Court issued its decision in *Reno v. ACLU* (1997).[124] In a 7 to 2 opinion authored by Justice John Paul Stevens, the Court struck down as unconstitutional both the "indecent transmission" and "patently offensive display" provisions of the Communications Decency Act.

In affirming the district court decision, the Supreme Court distinguished regulation of the Internet from broadcast and cable regulation. It said: "Neither before nor after the enactment of the CDA have the vast democratic fora of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry [citing *Pacifica*]. Moreover, the Internet is not as 'invasive' as radio and television."[125]

The Court acknowledged that sexually explicit material from "the modestly titillating to the hardest core" could be found on the Internet and that, once it was available in any community, it was accessible everywhere. However, the Court noted that "users seldom encounter such content accidentally" and that software had been

developed to allow parents to control access by their children. The Court conceded that current software could not screen sexually explicit images but the technology was developing to block such content.

The Court applied a "strict scrutiny" analysis, almost guaranteeing that the provisions would be struck down. (Prior restraint rarely survives "strict scrutiny" review by the Court.) There were serious flaws in the CDA provisions, according to the majority opinion. They included: (a) parents are not allowed to consent to their children's access to restricted materials, (b) the provisions are not limited to commercial transactions, (c) "indecent" is not defined in the Act, and (d) there is no requirement that "patently offensive" material lack socially redeeming value. The Court said that the CDA lacked precision that the *First Amendment* requires when a statute regulates the content of speech. In order to deny minors, it suppressed speech that adults had a right to receive and address to one another. The burden on adult speech is unacceptable if less restrictive alternatives would be as effective in achieving a legitimate purpose.[126]

The government clearly has an interest in protecting children, but "that interest does not justify an unnecessarily broad suppression of speech addressed to adults." The majority opinion went on to characterize the breadth of the CDA's coverage as "wholly unprecedented." The government had argued before the Supreme Court, although not before the district court, that it had an interest in promoting growth of the Internet. But that court was not convinced, saying:

> The Government apparently assumes that the unregulated availability of 'indecent' and 'patently offensive' material on the Internet is driving countless citizens away from the medium because of the risk of exposing themselves or their children to harmful material.
>
> We find this argument singularly unpersuasive. The dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention. The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.[127]

As expected, advocates for strong First Amendment rights for the Internet reacted with great joy to the ruling, which attracted more media attention than almost any other Supreme Court decision at that time. Their glee was certainly warranted because the Court clearly saw cyberspace as an uncharted medium worthy of strong First Amendment protection—at least at that time. But there were hints in the majority opinion, even then, that the Court might be willing to entertain some restrictions on the Internet.

First, the Court agreed to allow the portion of the CDA dealing with obscene content to stand. The CDA included a severability clause that allowed the Court to leave intact those provisions and terms that were determined to be constitutional,

while severing those portions of the legislation that were unacceptable. In other words, the Court could simply strike those provisions and terms that presented constitutional problems, while allowing the rest of the Act to remain in effect. The Court rejected this opportunity, except for the term *obscene* in Section 223(a), which it allowed to remain. The net effect of this move by the Court was to keep alive the ban on obscene content on the Internet.

Second, throughout the majority opinion, the Court emphasized that the major problem with the two provisions of the Act was the breadth with which it swept in protected speech because of its vagueness. The Court noted, for example, that it agreed "with the District Court's conclusion that the CDA places an unacceptably heavy burden on protected speech, and that the defenses [advanced by the Government] do not constitute the sort of 'narrow tailoring' that will save an otherwise patently invalid unconstitutional provision."[128] Thus the Court appears to be hinting that it might be willing to entertain a better-drafted statute.

Phone Indecency

Another area of obscenity and indecency in which the FCC has become involved is the so-called dial-a-porn telephone services that use various call prefixes to offer sexually explicit recordings. In some cases, this involves two-way conversations about sex with callers, who are charged fees for a minute or more. Dial-a-porn had become big business by the time Congress acted in 1988 to amend Section 223(b) of the 1934 Federal Communications Act to ban both indecent and obscene interstate telephone messages. The purpose of the amendment was clearly to crack down on the dial-a-porn services.

Sable Communications, one of the services, which had been operating for five years, filed suit against the FCC, seeking a declaratory judgment that the indecency and obscenity portions of the amendment violated the First and Fourteenth Amendments to the Constitution. In *Sable Communications of California v. FCC* (1988),[129] the U.S. Supreme Court upheld a U.S. District Court decision that the amendment's indecency provision but not the obscenity provision violated the Constitution. The Court ruled 6 to 3 in an opinion written by Justice White that, in its present form, the law "has the invalid effect of limiting the content of adult conversations to that which is suitable for children to hear. It is another case of 'burning up the house to roast the pig.'" The justices felt that the legislation had not been narrowly drawn enough to promote the government's legitimate interest in protecting children from exposure to indecent telephone messages.

In response to the *Sable* decision, Congress passed a new amendment sponsored by Senator Jessie Helms (R-N.C.) that revised Section 223 of the Federal Communications Act of 1934 to ban the use of a telephone for "any indecent communication for commercial purposes which is available to any person under 18 years of age or to any other person without that person's consent, regardless of whether the maker of such communication placed the call." The law requires phone companies to block

access to dial-a-porn services unless the customer requests access in writing. In 1990 the FCC issued rules that defined telephone indecency as descriptions of "sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the telephone medium." This was essentially the same as its definition for indecency for broadcasting. The FCC also promulgated new rules that established a defense for such telephone services if they gave written notice to the telephone company that they provided such communications or if they required an identification code before transmitting the messages or scrambled messages only decipherable by someone with a descrambler.

One of the providers of dial-a-porn, Dial Information Services of New York, and three similar companies sought an injunction in U.S. District Court in Manhattan to prevent the commission from implementing the Helms amendment.[130] Two days before the law was to take effect, U.S. District Judge Robert P. Paterson granted the request on the grounds that the law was likely unconstitutional because it required common carriers (telephone companies) to make a prior determination of whether particular speech was or was not indecent and the term *indecency* was too vague. Paterson also said the law did not, as required, use the least restrictive means of imposing prior restraint to keep minors from obtaining access to the messages. The FCC appealed. In a 3 to 0 ruling in *Dial Information Services of New York Corp. v. Thornburgh*,[131] the Second Circuit U.S. Court of Appeals reversed the trial court decision. It held that the statute's definition of indecency was adequately defined and the regulations were not unconstitutional prior restraint because the services merely had to classify their messages, not halt them, and any adults attempting access to the services could still do so by simply stating their intent in advance. According to the Court of Appeals, "It always is more effective to lock the barn before the horse is stolen."[132] The U.S. Supreme Court denied certiorari.[133]

Live Nudity and the First Amendment

Finally, the U. S. Supreme Court has become the final arbiter in deciding whether nude dancing has constitutional protection. Obviously, live performances that are deemed obscene can be banned, but what about non-obscene nude performances? The Court has traditionally kept its views on the issue undercover, but it was inevitable that the justices had to give either a green or a red light to state statutes around the country that bar or restrict nude public performances.

The Court first became involved in the constitutional aspects of nude dancing in 1956. It upheld an obscenity conviction of a stripper on grounds that the statute was a valid exercise of a state's police authority.[134] For the next 16 years, the justices denied certiorari when such cases were appealed, but in 1972 the Supreme Court upheld a California statute that prohibited acts of "gross sexuality," which included sexually explicit live entertainment where alcohol was served.[135] Several similar decisions followed in which the Court essentially held that both nude and topless dancing in businesses where alcohol was served could be prohibited.[136] Only one

Supreme Court decision gave any reprieve to nude dancing and that occurred in 1975 when the Court unanimously overturned a preliminary injunction issued by a New York trial court judge against three North Hempstead bars that featured topless dancing.[137] The U.S. Supreme Court said the state statute involved was too broad and therefore unconstitutional because it applied to all live entertainment, including artistic works. This decision was cited for many years as granting First Amendment protection to nude dancing. But that was a serious misinterpretation because it was clear that the Court was not trying to protect traditional nude dancing in bars but to protect plays and socially redeeming works that might include some nudity.

The Court has wrestled with the issue of whether nude dancing enjoyed First Amendment protection as speech or expression or whether it was really conduct. In *Barnes v. Glen Theatre* (1991),[138] the justices lined up 5 to 4 against the dancers by upholding an Indiana public indecency statute that required female strip-tease dancers to wear at least G-strings and pasties in their performances. The Supreme Court overturned a Seventh Circuit U.S. Court of Appeals ruling involving dancers at the Kitty Kat Lounge in South Bend, Indiana, that "non-obscene nude dancing performed as entertainment is expression and as such is entitled to limited" First Amendment protection. The plurality opinion written by Chief Justice Rehnquist who was joined by O'Connor and Kennedy said: "Nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." That protection, however, is overridden by the state's interest in protecting morals and public order. "The requirement that the dancers don pasties and G-strings," Rehnquist said, "does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less erotic."

Associate Justice David Souter concurred only with the result of the case, asserting that the statute was a valid exercise of the state's interest in preventing prostitution, sexual assault, and other crimes. Justice Scalia also concurred with the Court's judgment but on the ground that the statute involved no First Amendment issues. Justices Marshall (who resigned at the end of the Court's term and was replaced by Clarence Thomas), Blackmun, Stevens, and White dissented on the ground that the dancing was protected expression.

In a follow-up to *Barnes v. Glen Theatre*, the Supreme Court ruled 5 to 4 in two different opinions that a Pennsylvania ordinance requiring exotic dancers to wear G-strings and pasties while performing was constitutional. [139] In this case, *City of Erie v. Pap's A.M.*, the court in 2000 said cities may bar nude dancing to deter the secondary effects of criminal activity associated with adult businesses. This is consistent with government interest in regulating public safety, health, and morals. [140]

Indecency and the Arts

Although the third prong of the *Miller* test for obscenity makes it clear that materials having serious artistic value by definition cannot be obscene, the arts have continued to suffer at the hands of some government officials. One of the most publicized

cases involving censorship of the arts is *National Endowment for the Arts v. Karen Finley*.[141] The case focused on the constitutionality of a statute enacted by Congress requiring the head of the National Endowment for the Arts (NEA) to take into account "general standards of decency and respect for the diverse beliefs and views of the American public"[142] when making decisions regarding grants.

The same year the Act was passed, Karen Finley and three other artists sued the NEA. They claimed that the "decency" provision of the law violated their First Amendment rights.[143] Finley received NEA support before the statute was enacted for a performance in which she appears on stage nude, covered with chocolate, and says "God is death."[144] Her grant and those of some other artists and performers spurred Congress into taking steps to stop such funding, including the 1990 Act. The U.S. Supreme Court in an 8 to 1 ruling in June 1998 upheld the law for NEA to consider decency when deciding whether artists would receive government support.

At the start, the United States District Court for the Central District of California ruled in 1992 in favor of Finley and the other plaintiffs, holding that the law was unconstitutionally vague and "gives rise to the danger of arbitrary and discriminatory application."[145] Four years later, the Ninth Circuit U.S. Court of Appeals in a 2 to 1 vote affirmed the lower court decision.[146] According to the majority opinion, "Even when the Government is funding speech, it may not distinguish between speakers on the basis of the speaker's viewpoint or otherwise aim at the suppression of dangerous ideas." The Court held at that time, "Government funding of the arts, in the circumstances of this case, must be viewpoint neutral."[147] But in the final analysis the Supreme Court decided in 1998 that the NEA could consider decency standards in awarding grants. The opinion in the case was written by Justice Sandra Day O'Connor, and the only dissenting opinion was filed by Justice David Souter. One of the central figures in the case, Karen Finley, continued to present performance art and, in 2000, her book *A Different Kind of Intimacy: The Collected Writings of Karen Finley* was published.[148]

Ethical Dilemmas Facing the Media in Obscenity and Indecency Cases

Obscenity cases such as police raids on adult bookstores and indecency cases like *Barnes* generally attract considerable media attention, although their impact to the First Amendment may arguably not be as strong as other less "sexy" restraints on free expression. Public officials inevitably damn the evils of pornography and indecency, often confusing the two and thereby add to misunderstanding. Taken out of context, even the mildest forms of depiction of sex and nudity can appear offensive, as Georgia prosecutors demonstrated in a dispute over the movie *Carnal Knowledge* in *Jenkins v. Georgia*. But, as the Court said in the decision, *Miller* requires that hard core depictions be involved. Nudity alone is not enough.

A close reading of the plurality opinion in *Barnes* and the concurring opinions, though, reveals a rather different attitude of the Court—one that sees virtually no protection in nude expression. There may be a difference between live nude performances and nude photographs or film, but the fact remains that each form involves expression. The only real difference is that one is live and therefore ephemeral, and the other is recorded and thus more permanent. Yet the less permanent form enjoys virtually no protection, and the more permanent one can count on substantially greater protection. Thus a dancer at the Kitty Kat must wear pasties and G-strings, but if she becomes a *Playboy* centerfold, she can bare all. The venue does make a difference as the *City of Erie v. Pap's A.M.* case showed, with the U.S. Supreme Court saying that cities may bar nude dancing to hamper deleterious secondary effects, especially an increase in crime.

This situation touches on the first of five major ethical dilemmas facing the news media in covering obscenity and indecency stories: How far should journalists go in defending individuals and organizations that test the First Amendment to its limits? Neither the Kitty Kat dancers nor 2 Live Crew attracted much support from the news media and even the Cincinnati Contemporary Center for the Arts gained only limited editorial favor from the news media in fighting prosecution over the Mapplethorpe photo exhibit. The Larry Flynts of the world can count on even less support even when movies about them portray them as heroes.

As the late U.S. Supreme Court Justices William O. Douglas, William Brennan, and Thurgood Marshall so eloquently argued, the First Amendment must be strong in order for it to have meaning. Protecting thoughts is not enough; we must protect the expression of those thoughts as well. Most of the major news media such as the *New York Times* and major chains such as Gannett, Knight-Ridder, and Scripps Howard continue to fight in editorials and in other ways against restrictions on freedom of speech and freedom of the press. They do this even when situations and individuals involved have no popular support, especially from politicians.

Perhaps erotic dancers do not deserve First Amendment protection; but where is the line drawn beyond nude dancing? What about plays with nudity? Why should the latter be considered First Amendment expression when the former, as noted in *Barnes*, is "within the outer perimeters . . . only marginally so"? Is it because the audience for one is a group of blue-collar, middle-age males, whereas the other attracts people with an interest in art and culture?

A second dilemma facing journalists in dealing with obscenity and indecency is deciding how graphic or detailed descriptions of cases should be. During the final Senate Judiciary Committee hearing on the senior President George Bush's nomination of Clarence Thomas as associate justice of the Supreme Court, some of the testimony from University of Oklahoma Law Professor Anita Hill and other individuals about Thomas' alleged sexual harassment of her was quite graphic. There were references to a pubic hair on a Coke can and a porn star named "Long Dong Silver."

The Cable News Network and other networks carried testimony "live" to one of the largest television audiences ever of a Senate hearing. Some people were angered that this content was aired without editing. Most were surprised that the sexually

explicit references were not deleted but the importance of the process appeared in this case to trump off-color content.

During the Palm Beach, Florida, trial in which William Kennedy Smith was acquitted in 1991 of the alleged rape of Patricia Bowman, explicit testimony about semen, ejaculation, the lack of a condom, and so on was carried live on cable by Court TV. Some portions of the trial were broadcast by CNN and other networks. Bowman's identity was blocked by some media outlets until her interview on ABC-TV's *PrimeTime Live* after Smith was acquitted.

Both the Smith trial and the Thomas confirmation hearings significantly boosted CNN's ratings, although they had little impact on the numbers for NBC, CBS, and ABC.[149] Considerable criticism from the public bolstered the ratings, and the senior President Bush indicated that he felt the two events should not have been televised because of the offensive language. Later, broadcast reports during the impeachment hearings of President Bill Clinton raised eyebrows, particularly the details of his sex scandal with White House intern Monica Lewinsky. Independent Counsel Kenneth Starr provided Congress with a detailed 445-page report including explicit descriptions of sex acts performed in the White House. Starr's report mentioned oral sex 92 times, genitalia 39, phone sex 29, and sexual activity between Clinton and Lewinsky in the White House 10 times. In his book *Sex Sells! The Media's Journey from Repression to Obsession*, Rodger Streitmatter maintains that sex was lurking as a background issue in the news until the semen stain was reported on Monica Lewinsky's blue dress as part of the story. That would seem to make it difficult for journalists of every stripe to ignore, but some liberal columnists and even members of the public cried foul because the reports were considered so salacious—too detailed. On the other hand, and despite the protests, ratings remained high. [150]

In 2004, conservative talk show host Bill O'Reilly was sued for sexual harassment by a Fox News Channel producer. Fox filed a countersuit against the producer and her attorney. Included in the producer's charges were allegations that O'Reilly, her boss, had in phone conversations suggested that she "buy a vibrator and was clearly excited."[151] O'Reilly disclosed that the producer's attorney demanded $60 million in what he termed "hush money" not to file the lawsuit. O'Reilly countered that the charges represented a "politically motivated extortion attempt." At the end of the day, the public was exposed to statements quoted as part of phone sex conversations and, once again, questions of bad manners and bad taste were raised.

Media critics generally split on whether the intense attention by the press in some of these cases is really warranted. Some question whether the language should have been included. But certainly a strong argument can be made that the public must be exposed to the grit in such situations in order to understand and evaluate the situation. Anita Hill's explicit references in the case of Supreme Court nominee Clarence Thomas clearly were relevant in explaining her charges. The Smith rape trial was handled in the courtroom the way almost any other rape trial would be, including explicit testimony that the jury had to hear as evidence.

A third and related dilemma is whether the print and electronic media should include the specific words and pictures in indecency and obscenity cases. Obviously, it

would be highly irresponsible for a TV or radio newscast, especially in prime time, to broadcast words such as those in *Pacifica Foundation* even though they may be integral to understanding a story. When a local campus radio station that had drawn the ire of some members of the community for its music lyrics is challenged, the words may be unnecessary for understanding's sake. But, is there a context in which those words can be repeated so the reader does not have to rely on rumors to know the language involved? What about the use of a sidebar inside a newspaper or a cautionary preliminary note in a late night newscast? Or is it better to simply use euphemisms such as "explicit sexual references," "bodily functions," and "offensive language"? How about using the omitted letters technique as in f--k, s--t, and p--s or simply f--, s--?

Different news organizations handle these situations in different ways, but every station, newspaper, and magazine should have a written, clear policy about how these kinds of stories are to be covered. Regardless of how it is done, readers will complain, and so news organizations need to be able to easily explain why specific language did or did not appear.

A similar sensitive problem sometimes arises when police conduct raids of adult theaters and bookstores. How do you convey to a reader or viewer the kinds of materials confiscated or the specific act that the actor known as Pee Wee Herman allegedly committed at an adult theater in Sarasota, Florida? Some of the news stories about the incident simply said that Paul Reubens had been charged with indecent exposure; others stated that he was arrested for masturbating. There seemed to be much greater concern about how parents should explain to children what had happened to Pee Wee Herman than the legal fate of Paul Reubens. In fact, there was more space devoted in the news media to the reactions of parents and children than to resolution of the case. When Reubens pleaded "no contest" and paid a $50 fine, the decision warranted little more than a 15-second blip on the TV screen and a few column inches in the daily newspaper.

Typically, newspapers and television newscasts will show police loading marked boxes and cartons when they conduct a search of an adult bookstore, and the public is invariably left with no idea of the exact materials seized. Were the books and videos the same as those available in more proper establishments, such as chain drug stores, convenient marts (behind the counter, of course), and the local video rental store (in that special adult section)? Or are the works truly hard core? It is certainly not necessary for reporters to hold up copies of the pages or to show excerpts from the X-rated movies, but should they not at least be more specific about the kinds of sex featured? The press is also placed in the odd position of being faced with the dilemma of giving attention to performers, especially so-called shock jocks on radio, who often appear to have contrived outrageous events to simply attract attention for the purpose of gaining publicity and notoriety.

The consumer is usually quite interested in knowing whether deviant conduct such as bestiality and child pornography is depicted or if the works are typical heterosexual and homosexual depictions familiar to most adults. Why should members of the public know less about the nature of such materials than the jury and

judge who will be deciding the defendant's fate? In murder and other criminal trials, the public usually has more information available to it than the jury, which is restricted from seeing and hearing certain kinds of information. Why should the reverse be true in obscenity and indecency cases?

With stories about nudity and sex, some newspapers and magazines as well as television shows carry edited versions of recordings, pictures, and so on. In these cases, the nudity is blurred out or the profanities replaced, as in re-runs of "The Sopranos," just enough to offer the public a good idea of the subject matter but not enough to incur outrage from government officials. Are these techniques more ethical than exposing the consumer to the actual nudity or words, or are they simply a means of avoiding the wrath of the FCC and angry viewers or readers? On the other hand, it certainly could be argued that providing even the edited versions is really only a convenient cover for attracting a larger audience with titillations and tasteless promos. Where should the line be drawn?

A fourth dilemma involves whether the print and electronic media should accept (a) advertising for adult bookstores, theaters, and movies (with or without provocative titles and visuals) and/or (b) advertising for ordinary products that contain offensive language or full or partial nudity. The broadcast industry has been far more conservative than newspapers on this issue. This is undoubtedly because of concerns about FCC actions, but all of the mass media, except some magazines, have traditionally rejected both types of advertising even though there is virtually no fear they would ever be prosecuted, even in the most conservative communities. They probably fear public pressure.

Some media outlets, especially major daily newspapers, compromise by permitting adult establishments to advertise but not to mention specific titles (whether or not highly offensive) or to use terms such as *X-rated*, *explicit material*, and so forth. Some even carry ads from adult escort firms and dial-a-porn services, usually under the rationale that the media cannot make judgments about acceptability of businesses so long as they are offering a legitimate product or service.

Broadcasters, magazines, and newspapers can never be required to carry any particular ad or form of advertising, but at least one newspaper has been caught in a bind over legal notices. The *Boston Globe* once rather reluctantly published a 2½″ × 15½″ legal notice listing titles of 355 allegedly pornographic books and magazines seized by police.[152] Under a 1945 Massachusetts statute, publications cannot be officially prosecuted as obscene until a legal notice has been published in a Boston newspaper and in a newspaper in the county where the materials are seized. Many of the titles were quite graphic and included profanities. Examples included such titles as *Mother's into Bondage* and *Sextraverts*.[153]

The other Boston daily, the *Boston Herald*, refused to publish the ad, as it had the right to do, because a newspaper cannot be required to publish legal notices unless it has a contract as an official publication outlet of the state. Both the *Globe* and the *Times-Union* in Springfield, Massachusetts, where the publications were confiscated, published the ad twice, as stipulated in the statute. The *Globe* included a notice with the ad indicating that it was published to comply with state law, whereas

the *Times-Union* ran no disclaimer but did run an editorial saying that the legal notice was not an endorsement of the prosecutor's actions.

The final dilemma is one that the news media rarely face. But it is one that, nevertheless, can be rather difficult to resolve: *how specific should a story be about an incident involving indecency or pornography when there is no major concern about offending language or nudity but instead a concern about the possibility of copycats?* A prime example of this problem is illustrated in a Fifth Circuit U.S. Court of Appeals decision in 1987, *Herceg v. Hustler.*[154] The appellate court held that *Hustler* magazine could not be held liable for the death of a 17-year-old boy occurring after he attempted a technique described in the magazine. The article offered detailed information about *autoerotic asphyxia*, in which a person affixes a rope around his neck to stop his breathing at the peak of sexual stimulation.

The case originally received little press attention, probably because editors feared attracting more individuals to read the article and possibly attempt the same act. The article, according to the court decision, did stress the "often-fatal dangers" of the practice, recommended "readers seeking unique forms of sexual release DO NOT ATTEMPT this method," and indicated that the information was "presented here solely for an educational purpose." Even when the decision was handed down by the appellate court, most newspapers and broadcast news either overlooked or ignored it, even though it had considerable public interest.

Similar safety issues arose when MTV's *Jackass* series featured outrageous stunts performed by Johnny Knoxville. A number of suits resulted from imitations of death-defying stunts gone bad, inflicted on themselves by watchers of this program. Even with a disclaimer telling viewers that they should not attempt to recreate or perform anything that they saw on the series, MTV was left trying to defend the airing of these stunts and the injuries to some viewers. With claims that the programming had in some manner instigated personal injury, MTV repeatedly added that the program was clearly rated not suitable for those under 18 years of age.

In terms of print journalism, generally, there is no liability even for a publication that originally carries such a story of extremely violent acts and certainly no fear of liability for news coverage about such cases, no matter how detailed they may be. But, is it ethical to carry these stories? If they deserve attention, how far do you go? Should the technique be outlined with a warning and the hope that it will educate the individuals who might be tempted and possibly save lives? On the other hand, should the specific magazine and issue be mentioned when it would provide ready access to someone who might model the incident? What are the ethical responsibilities in these situations that invoke the same concerns as "copycat suicides"?

Summary and Conclusions

Obscenity, pornography, and *indecency* are terms often used interchangeably by the public and sometimes even by journalists, but they are not synonymous. Pornography is simply a layperson's term for obscenity, a term used by the courts,

but there are major differences between obscenity and indecency in the eye of the law. **Obscenity**, as defined by the U.S. Supreme Court in *Miller v. California* in 1973 requires (a) that the average person, applying contemporary community standards, find the work as a whole appeals to prurient interests, (b) that the work depict or describe in a patently offensive way sexual conduct specifically defined by state law, and (c) that the work, taken as a whole, lacks serious literary, artistic, political or scientific value. This standard is conjunctive, which means that all three prongs of the test must be met before a work can be declared legally obscene.

Contrary to popular opinion, featuring explicit sex alone or nudity alone is not enough. As the Supreme Court said in *Jenkins v. Georgia*, the conduct depicted must be hard core sexual activity, not simply nudity or offensive conduct. However, even explicit sex is not enough, as illustrated by an advisory jury's decision in 1981 in a case involving the movie *Caligula*.[155] Penthouse International, the owner of the film, filed a request in equity court for a declaration that the film was not obscene and an injunction to enjoin the Solicitor General of Fulton County (Atlanta), Georgia, from arresting or prosecuting anyone connected with the film's distribution—as he had threatened to do if the film were shown in his jurisdiction.

An advisory jury determined that the film was patently offensive and its sexual depictions an affront to community standards, but, viewed as a whole, the film did not appeal to the average person's prurient interest in sex (applying contemporary community standards). The judge in the case also found that, based on expert testimony, the movie had both serious and artistic value. Thus the film was not obscene even though it contained "a prolonged and explicit lesbian love scene" and "is a dizzying display of bodies, genitals, orgies, heterosexual and homosexual activity, masturbation, bodily functions, and sexual conduct and excesses of all varieties."[156] To be obscene, a work must pass all *three* prongs of the *Miller* test, not just one or two.

It is still relatively rare for a newspaper or radio or television station to be prosecuted for obscenity, although magazines, books, and films occasionally face such charges. Indecency is generally not a major problem for the print media, but broadcasters and cable operators still have to worry about offending the FCC and Congress. Indecency, unlike obscenity, need not appeal to prurient interest, and thus is easier to demonstrate, especially when explicit sexual expressions and terms are used.

In *Barnes v. Glen Theatre* (1991), the U.S. Supreme Court held that a state could bar nude dancing. But the majority could not agree on a rationale, indicating that the Court could at some point rule that some forms of nude dancing may have First Amendment protection, just not the kind displayed at the Kitty Kat Lounge, although the decision in *City of Erie v. Paps* acknowledges a relationship between community standards for decency and consequences occurring beyond the local strip club door. [157]

Both obscenity and indecency continue to draw inordinate attention from politicians and police, but the U.S. Supreme Court generally appears to be steering away from becoming the high court of obscenity again. Any future decisions in this area are likely to be little more than fine tuning, as the Court did in *Pope v. Illinois* (1987), the last step determining the level of authority involved in each of the three prongs of the *Miller* standard. We now know that prong one relates to *local*

community standards, prong two to *state standards*, and the third prong (the LAPS test) must look to *national standards*.

The Motion Picture Association of America—the industry association that rates movies voluntarily submitted from G to X based on their level of violence, sex, and offensive language—abolished the X-rating in 1990 and replaced it with NC-17 (no children under 17 admitted) in response to public criticism of its rating system, complaints of unwarranted censorship from film makers and critics, and the extensive use of the X-rating by the pornographic film business which the MPAA had not trademarked. The first movie to get the NC-17 rating was *Henry and June*. Very few MPAA films ever received a final X-rating anyway, although some acclaimed productions such as *Midnight Cowboy, Last Tango in Paris* and *Clockwork Orange* were released with the tag. Now, however, X is left for the adult movies that primarily serve as video industry products.

As illustrated by *Reno v. ACLU* (1997), the technology now facing the most serious assault from authorities over alleged indecency and pornography is the home computer. Many of the software catalogs, including those selling public domain programs and shareware, sell sexually explicit disks containing adult sex games or actual computer images of explicit sex.[158] Will computer-simulated sex be possible with the next wave of video technology known as *virtual reality*, which makes three-dimensional images possible with a personal computer. How will libraries remain accessible while protecting children from online predators? These issues are widely debated.[159] In the first instance, the U.S. Supreme Court has already ruled that child pornography created through digitalization or morphing cannot be prosecuted when no children were involved. Every meeting of librarians includes sessions regarding online access.

Over-the-air broadcasters have become very frustrated by shrinking audiences and increased competition from sources offering content on the fringe of good taste or bad manners. They are annoyed that federal regulators have stepped up to challenge the content of their programs while their satellite and direct TV cable competitors have become much less inhibited. Some of the most popular television shows focused by key demographic groups of the past decade such as *The Sopranos* and *Sex in the City* were programmed over cable outlets, in this case HBO, with scant scrutiny by the FCC. Meanwhile, the over-the-air broadcasters are left to defend what would appear by comparison to be relatively minor annoyances. Because of the spectrum of cases, particularly *Reno v. ACLU, U.S. v. American Library Association, Ashcroft v. Free Speech Coalition*, and also *Ashcroft v. ACLU,* the Internet has become a battleground medium for an information war over access to indecent content. This occurs while the states and Congress attempt to work around the court decisions to protect children. Requirements for schools and libraries to employ filtering software and demanding that Internet service providers create special domain codes for sites deemed offensive or harmful to children continue to create minefields in this war.

Satellite and cable television and radio continue to push the boundaries of indecency and obscenity, but occasionally even these media have to pull back. In 2007 XM Satellite radio shock jocks "Opie and Anthony" apologized for airing a homeless man's comment on their show that he would like to have sex with then-Secretary

of State Condoleezza Rice, First Lady Laura Bush and Queen Elizabeth. Anthony Cumia ("Anthony") and Gregg Hughes ("Opie") were given a 30-day suspension from their show by XM.[160]

Endnotes

1. *Fox Takes Issue with FCC Finding*, Las Vegas (Nev.) Review-Journal, (Associated Press) Oct. 14, 2004, at A11.
2. 47 U.S.C. §559 (2005).
3. Pub. L. 100-690, 102 Stat. 4181, Nov. 18, 1988.
4. *Cuomo Refuses Extradition of Programming Execs*, Onsat, July 22, 1990, at 8; *HDO Pleads Guilty*, Onsat, Dec. 9, 1990, at 105; *HDO Pleads Guilty to Federal Charges,* Onsat, Jan. 6, 1991, at 6.
5. *Couple Guilty in Computer Porn Case*, Lexington (Ky.) Herald-Leader, July 29, 1994, at A5; Leslie Miller, *Panel Agrees: Rethink Net Porn Laws*, USA Today, Oct. 17, 2000, at D3; Robert S. Greenberger, *High Court Strikes Down Ban on 'Virtual' Child Pornography*, Wall Street Journal, Apr. 17, 2002, at A4; David G. Savage, *Not Real? Not Porn*, A.B.A. J. 88, June 2002, at 34.
6. *See* Jennifer Lee, *New U.S. Database Will Track Abusers, Children in Porn*, Lexington (Ky.) Herald-Leader (New York Times News Service), Feb. 9, 2003, at A18.
7. Rebecca Miller, *Lewd 'Radiochick' Gains Following*, Atlanta Journal-Constitution (Associated Press), July 24, 2005, at MS-2; Jamie Gumbrecht, *Nipplegate One Year Later: American Media Still Reeling, but 'Desperate' to Provide Smut*, Lexington (Ky.) Herald Leader, Feb. 6, 2005, at C14. Note the quote in response to the question: "Do you think *Desperate Housewives* can be restricted?" Answer: "No. People favor keeping airwaves from being filled with smut, but if it's a show they like, they don't see smut. They say, 'Well that's not what I'm talking about. I'm talking about that hard core stuff.'"
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9. *Regina v. Hicklin*.
10. *United States v. One Book Called "Ulysses,"* 5 F.Supp. 182 (S.D. N.Y. 1933).
11. *United States v. One Book Called "Ulysses*," 72 F.2d 705 (1934).
12. R. J. Wagman, *The First Amendment Book* 203 (1991).
13. *Alfred E. Butler v. State of Michigan,* 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412 (1957).
14. *Id*.
15. *Samuel Roth v. United States* and *David S. Alberts v. California,* 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, 1 Med.L.Rptr. 1375 (1957).
16. *Id*.
17. *Near v. Minnesota,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357, 1 Med.L.Rptr. 1001 (1931).
18. *Roth v. United States* and *Alberts v. California*.
19. *Id*.
20. *Eleazor Smith v. California,* 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959).
21. *Id*.
22. Ky. Rev. Stat. §531.020 (1996).
23. Ga. Code Ann. §16-12-80 (1997).
24. *United States v. X-Citement Video,* 513 U.S. 64, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994).
25. *Manual Enterprises, Inc. v. Day, Postmaster General of the United States,* 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639 (1962).
26. *Nico Jacobellis v. Ohio,* 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964).
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28. *Ronald L. Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).

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30. *Id.*
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33. *Ralph Ginzburg et al. v. U.S.,* 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31, 1 Med.L.Rptr. 1409 (1966).
34. *Id.*
35. *Id.*
36. *Edward Mishkin v. New York,* 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56 (1966).
37. *Marvin Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419, 1 Med.L.Rptr. 1441 (1973).
38. *Robert Redrup v. New York, William L. Austin v. Kentucky*, and *Gent et al. v. Arkansas*, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967).
39. *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195, 1 Med.L.Rptr. 1424 (1968).
40. *Interstate Circuit, Inc. v. Dallas* and *United Artists Corp. v. Dallas,* 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968).
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56. *Id.*
57. *Hammer v. Dagenhart*, 247 U.S. 251, 38 S.Ct. 529, 62 L.Ed.2d 1101 (1918).
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