Law & Business For Artists

Richard Dooling

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The First Amendment

The First Amendment says:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

But working artists and the people represent them are usually not concerned about establishing religions or assembling to petition the government. Artists just want to make "speech" or art. So an edited version of the First Amendment for those in the entertainment and publishing industries might go like this:

> Congress shall make no law . . . abridging the freedom of speech.

So much for *Congress* not making laws. Then we add the Fourteenth Amendment, which says:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Read together, the First and Fourteenth Amendments prohibit *GOVERNMENTS* from making laws abridging the freedom of speech. Private parties using private, lawful means may "abridge" the speech of others without causing First Amendment problems (e.g. by firing "speakers," or boycotting their performances, or slapping an NC-17 rating on their movies, or an ESRB warning on their video games.)

So always look for *STATE ACTION* first to determine if you have a First Amendment issue. The easiest way to check for state action? Look for a law (statute, ordinance, regulation), then look at the speech which supposedly violated the law.

What Is Speech?

In the United States, the First Amendment protects speech, but what kinds of speech? Spoken words? Printed words? Any behaviors meant to convey a message? Flag burning? Movies? Video games? Nude dancing? Child pornography? Writing a book called: *How To Make A Suitcase Nuke?*

What about slander? Isn't that speech? Or fraud, or hiring somebody to murder your spouse, or lying to an IRS agent, or committing perjury, or soliciting a prostitute? All involve speech, right? So does that mean Congress can't make laws against that speech?

The First Amendment obviously does not protect ALL speech. Author Kurt Vonnegut once observed that: "The First Amendment reads more like a dream than a law." Indeed. So what speech is protected by the First Amendment? Or is it easier to ask what speech is NOT protected by the First Amendment?

If the First Amendment doesn't mean what it says, then what does it mean? Some First Amendment absolutists ask: What part of make no law is it that you don't understand?

What is the Purpose of the First Amendment?

Sounds like a question the professor might pose to kill twenty minutes of class time when he's unprepared to teach the next case, but the question lurks in the background of many a Supreme Court opinion. If the First Amendment doesn't protect all speech, then courts must decide case-by-case what types of speech the Bill of Rights prohibits governments from abridging.

Why was the First Amendment added to the Constitution in 1791? And if Congress meant what it said about passing no laws abridging the freedom of speech, then why seven years later (in 1798) did Congress pass the Alien and Sedition Acts which made it a crime for anyone to publish "false, scandalous, and malicious writing against the government or its officials?"

UCLA Law Professor Eugene Volokh argues that the problematic words are not "make no law," but rather "the freedom of speech." In speculating about what the Founders had in mind, Volokh has this to say.

> It's much like, if tomorrow a state enacted a law protecting "the freedom to marry," we probably wouldn't think that it means the freedom to marry a 10-year-old, or the freedom to marry one's daughter, or (depending on the circumstances) even the freedom to marry several people at once. "The freedom to marry" would be seen as referring to a broad but not unlimited concept that is less than the freedom to marry anyone one pleases.

In the same way, libel and slander and perjury were illegal in England long before the Founders wrote the Bill of Rights. Volokh continues:

> Now, to be sure, during and after the controversy over the Sedition Act of 1798, some foes of the Act argued that the First Amendment did bar Congress from any authority to restrict spoken or printed words. But I'm rather skeptical that this was then or is now a sound interpretation of the constitutional text.

- Eugene Volokh on the meaning of "Congress shall make no law . . .".

Do we have a First Amendment because speaking one's mind is a basic human right? Like the freedom to travel, or freedom to buy birth control? Perhaps the colonists wanted only to be certain that their new American government would be prohibited from imposing prior restraints on speech, the sort of licensing schemes that inspired the poet John Milton to write Areopagitica? In England once printing presses were invented, a publisher had to apply for a license to print any article criticizing the government. And if the government did not approve? Then no license to print.

Or maybe free speech is a kind of civic "safety valve" allowing aggrieved citizens to march in the streets or issue screeds on street corners instead of arming themselves and starting a civil war? Theories one and all that have been propounded as possible reasons we have a First Amendment.

The Marketplace of Ideas

When the Supreme Court addresses these questions, they steer between at least two competing principles of First Amendment jurisprudence that will never be reconciled (think Scylla and Charybdis, a rock and a hard place, the horns of a dilemma).

One principle is called the marketplace of ideas, first formulated by Justice Oliver Wendell Holmes, who wrote:

> The best test of truth is the power of the thought to get itself accepted in the competition of the market. –*Abrams v. United States* (1919)

To Justice Holmes, there's no such thing as good or bad speech, only speech that competes in the Darwinian marketplace and lives or dies. The Court's job is to strike down any attempts by the government to regulate the marketplace of ideas. Of course, there are the inevitable exceptions, because Holmes was also the Justice who wrote: "The most stringent protection of free speech would not protect a man falsely shouting fire in a theater and causing a panic."

Civic Republicanism

Justice Louis Brandeis offered a parallel and sometimes competing principle of First Amendment theory eight years later, when he described the purpose of the First Amendment:

> Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile . . . –*Whitney v. California* (1927)

See how Justice Brandeis suggests that the First Amendment does not exist to protect *all* speech; it exists to protect speech that leads to the discovery and spread of "political truth." Brandeis wants to protect speech, not because it's an absolute value or good for the soul, but because it's essential for democracy and civic republicanism. Quite a different concern than Justice Holmes' marketplace where ideas fight it out for survival of the fittest. In fact, Holmes would probably say that there is no such thing as "political truth." Truth is whatever the marketplace says it is. If cat videos beat out President Obama's State of the Union address, so be it.

First Amendment cases in the United States Supreme Court are dramatic battles, usually between speakers with unpopular or dangerous views and governments that want to ban or censor their speech. What will happen when the family of a fallen veteran sues the Westboro Baptist Church for picketing their son's funeral? Or what about virtual child pornography? Or pornography made without using real children, in which all of the "actors" are computer generated? Is virtual child pornography subject to the same extremely serious

penalties that the government imposes on creating, possessing, or distributing child pornography created by using real child actors?

Possibly you're wondering: Why do I need to know about child pornography? Well, if you are shooting a video of minors engaging in sex, or portraying minors in sexual situations, you risk violating the child pornography laws, which is why Hollywood usually uses actors who are adults but appear to be much younger and underage minors.

So a film producer or a director or a screenwriter or author needs to know that, yes, movies are "speech" within the meaning of the First Amendment, but not if the speech falls into certain traditional categories of "unprotected speech," or speech that is not protected by the First Amendment, like obscenity or "fighting words" or yes child pornography.

Are Movies Speech?

Oh, what might have been! In 1915, when the motion picture business was still in its infancy many states censored movies as a matter of course. The first time a case arguing that the "boards of censors" interfered with the First Amendment rights of people who displayed the films or wanted to see them, the United States Supreme Court said: I beg your pardon? Movies are NOT speech.

Mutual Film Corp. v. Industrial Commission of Ohio

U.S. Supreme Court (1915)

- case at Google Scholar
- case at Wikipedia.

The state government of Ohio passed a statute in 1913 forming a board of censors that had the duty of reviewing and approving all films intended to be exhibited in the state.

Under the Ohio law:

"Only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character shall be passed and approved by such board."

The Ohio Board charged a fee for the approval service, and the Board could order the arrest of anyone showing an unapproved film in the state.

When Mutual Film Corporation, a movie distributor, sued the Board arguing that this licensing scheme and Ohio's censorship of movies violated its freedom of speech, the company lost in the lower court and then appealed to the United States Supreme Court.

In a unanimous opinion, the Supreme Court noted the insidious power of movies to affect the sensibilities of women and children and dismissed Mutual Film's "freedom of speech" arguments without a second thought:

"[T]he exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded . . . as part of the press of the country or as organs of public opinion. They are mere representations of events, of ideas and sentiments published and known, vivid, useful and entertaining no doubt, but, as we have said, capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition."

The Hays Code

Hollywood panicked at the prospect of trying to distribute movies in fifty different states with fifty different boards of censorship and fifty different ideas about what makes a film "moral, educational or amusing and harmless."

From 1915 (the date of the *Mutual Film* decision) to 1952, the film industry zealously regulated itself to show the states they need not worry about censoring Hollywood movies. The industry created the infamous Motion Picture Production Code aka the "Hays Code" and aggressively enforced it.

Named after Will H. Hays, president of the Motion Picture Producers and Distributors of America from 1922 to 1945, the Code had three general principles:

1. No picture shall be produced which will lower the moral standards of those who see it. Hence the sympathy of the audience shall never be thrown to the side of crime, wrong-doing, evil or sin.

2. Correct standards of life, subject only to the requirements of drama and entertainment, shall be presented.

3. Law, natural or human, shall not be ridiculed, nor shall sympathy be created for its violation.

(From the Production Code, 1934)

Joseph Burstyn, Inc. v. Wilson

U.S. Supreme Court (1952)

- case at Google Scholar
- case at Wikipedia

The Production Code became more stringent and obnoxious to filmmakers until 1952 when a "miracle" happened, namely, Roberto Rosselini's *The Miracle* starring Anna Magnani as a dim-witted peasant girl who mistakes a bearded stranger (played by Federico Felini) for St. Joseph, her favorite saint. The bearded stranger plies the girl with wine and apparently ravishes her. When the poor girl discovers later that she is pregnant, she cries "It is the grace of God" and decides that she is the Virgin Mary and that this must be an Immaculate Conception.

Needless to say, the film offended and enraged Catholics all over the world (compare the offense Muslims take to cartoons of the Prophet Mohammed). The mighty Cardinal Spellman, Archbishop of New York, issued a statement condemning the *The Miracle* and ordered that it be read aloud at mass in 400 New York parishes. Even though Spellman had not seen the movie, he called it "a despicable affront to every Christian" and "a blot upon the escutcheon of the Empire State" whose Board of Regents had issued a license to allow *The Miracle* to be shown in the first place.

Parades and picketing followed. The Paris Theatre on two different evenings was emptied on threat of bombings. Three members of New York's Board of Regents viewed the film and concluded that *The Miracle* was "sacrilegious" and ordered the film producers to prove otherwise at a hearing. The hearing determined that the film indeed constituted religious bigotry, and the Commissioner of Education rescinded the producer's license to exhibit the picture.

Joseph Burstyn, Inc., distributor of *The Miracle,* sued, first in New York courts, which upheld the Board of Regents' determination that the film was sacrilegious. New York's highest court held that there was "nothing mysterious" about the law that gave New York the right to censor films, saying: "It is simply this: that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule."

The Miracle then went to the United States Supreme Court, where, in 1952, thirty-two years after the Court had declared movies to be "a business pure and simple" and not speech protected by the First Amendment, the Court finally decided not only that movies were speech protected by the First Amendment, but that any Board of censors trying to define "sacrilegious" would be "set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies, New York cannot vest such unlimited restraining control over motion pictures in a censor."

The First Amendment sometimes "feels" powerful and protective enough to take for granted, but as Justice Oliver Wendell Holmes observed "We should be eternally vigilant against attempts to check the expression of opinions that we loathe." –Oliver Wendell Holmes

Excerpts from the *Burstyn* opinion:

(As you read these excerpts, notice how the Court is uncertain about this new potentially dangerous technology (motion pictures) in much the same way that the modern Supreme Court s nervouse about another "new" potentially dangerous technology (video games), even though it recently decided that the state of California could *not* regulate the sale of violent video games to teenagers. Why? Because video games, even violent video games are protected speech.)

MR. JUSTICE CLARK delivered the opinion of the court.

[This case] is the first to present squarely to us the question whether motion pictures are within the ambit of protection which the First Amendment, through the Fourteenth, secures to any form of "speech" or "the press."

It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. As was said in *Winters* v. *New York,* 333 U. S. 507, 510 (1948):

> "The line between the informing and the entertaining is too elusive for the protection of that basic right [a free press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."

It is urged that motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree. That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures.

It is further urged that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression. Even if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from First Amendment protection. If there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here.

For the foregoing reasons, we conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments. To the extent that language in the opinion in

Mutual Film Corp. v. *Industrial Comm'n, supra*, is out of harmony with the views here set forth, we no longer adhere to it.

To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. That much is evident from the series of decisions of this Court with respect to other media of communication of ideas. Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule. . . .

A major purpose of the First Amendment guaranty of a free press was to prevent prior restraints upon publication, although it was carefully pointed out that the liberty of the press is not limited to that protection. . . .

New York's highest court says there is "nothing mysterious" about the statutory provision applied in this case: "It is simply this: that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule. . . ." This is far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society. In seeking to apply the broad and all-inclusive definition of "sacrilegious" given by the New York courts, the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies. New York cannot vest such unlimited restraining control over motion pictures in a censor. . . .

Under such a standard the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority. Application of the "sacrilegious" test, in these or other respects, might raise substantial questions under the First Amendment's guaranty of separate church and state with freedom of worship for all. However, from the standpoint of freedom of speech and the press, it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.

Since the term "sacrilegious" is the sole standard under attack here, it is not

necessary for us to decide, for example, whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films. That is a very different question from the one now before us. We hold only that under the First and Fourteenth Amendments a state may not ban a film on the basis of a censor's conclusion that it is "sacrilegious."

Reversed.

Categories of Unprotected Speech

In declaring that movies are indeed protected speech under the First Amendment, the United States Supreme Court in *Burstyn* took pains to point out that the film was not obscene within the meaning of another famous First Amendment case.

Chaplinsky v. New Hampshire

U.S. Supreme Court (1942)

- case at Google Scholar
- case at Westlaw.
- case at Wikipedia.

In late 1941, Walter Chaplinsky, a Jehovah's Witness, was preaching on a public sidewalk in downtown Rochester, New Hampshire. It was a busy Saturday afternoon, and Chaplinsky was passing out pamphlets and railing against organized religion, calling it a "racket." People complained to City Marshal Bowering, who responded by saying that Chaplinsky was "lawfully engaged." But Marshal Bowering also warned Chaplinsky that the crowd was getting restless.

Later, a disturbance occurred and the traffic officer on duty at the busy intersection started with Chaplinsky for the police station. On a public sidewalk near City Hall, the officer and Chaplinsky met Marshal Bowering who had been advised that a riot was under way and was therefore hurrying to the scene. Bowering repeated his earlier warning to Chaplinsky. Chaplinsky then shouted at Bowering:

> You are a Goddamned racketeer and a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.

Chaplinsky was arrested, charged and convicted in the municipal court of Rochester, New Hampshire, for violating a statute a New Hampshire state law that provided:

> No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

Chaplinsky appealed all the way to the Supreme Court, claiming that the law was "vague" and that it infringed upon his First Amendment and Fourteenth Amendment rights to free speech.

Justice Murphy, writing for a unanimous court, upheld Chaplinsky's conviction under the statute and crafted one of the most widely quoted paragraphs in First Amendment jurisprudence, often cited in cases where the first amendment speaker is about to lose the case:

> [T]he right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words–those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.

Unprotected Speech

Some call this a "two-tier" or "category" approach to the First Amendment, meaning, some speech is protected by the First Amendment and some isn't. *Chaplinsky* is famous for listing the classes of speech historically not protected by the First Amendment, but also famous for planting the seed of the notion that not all speech is valuable or "essential" to the "exposition of ideas," a very Brandeis-like argument.

Some of the categories (the obscene, the libelous, fighting words) are still with us. The Court has outlined several others (incitement, child pornography), but as we'll see the current Roberts Court is not receptive to legislatures

adding "new" categories of unprotected speech, like stolen valor speech, or animal crush videos.

Other governments have different concerns and different categories of offensive speech. France and Germany prohibit varieties of hate speech or speech denying the historical facts of the Holocaust. See, for example, the wide variety of free speech laws collected at Wikipedia: Free Speech By Country. Canadian courts have held that pornography which is "degrading or dehumanizing" to women may be prohibited (see R. v. Butler an analysis explicitly rejected by Judge Frank Easterbrook in *American Booksellers v. Hudnut*, 771 F2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986), Wikipedia.

- Nice summary of speech restrictions and unprotected speech categories

Child pornography and disclosing classified communications in violation of the Espionage Act are good examples. Both involve SPEECH, but the U.S. Supreme Court says these categories of speech are not protected by the First Amendment. Child porn and disclosing classified information therefore are both categories of "unprotected speech," meaning the government can fine you or send you to prison for engaging in them. 18 U.S. Code 2251 - Sexual exploitation of children

Obscenity

For several decades in the second half of the last century, the Supreme Court was deluged with obscenity cases, clearly a category of unprotected speech. But the problem was defining it.

Justice Potter Stewart gave the most honest and memorable definition in *Jacobellis v. Ohio* (1964):

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description ["hardcore pornography"]; and perhaps I could never succeed in intelligibly doing so. **But I know it when I see it**, and the motion picture involved in this case is not that.

As we'll see later, obscenity trials are almost pass because of the advent of the Internet, but obscenity is worth studying because it provides case studies in how legislatures attempt to ban certain categories of speech. If intellectual property is like oil, waiting to gush forth and become valuable, then it's as if the government says: It's against the law for you to drill for certain kinds of speech, or make certain kinds of intellectual property.

No better example then 2 Live Crew's "Nasty As They Wanna Be."

Skyywalker Records, Inc. v. Navarro

Federal Dist. Court, SD Florida (1990)

- case at Google Scholar
- case at Wikipedia
- The *Miller Test* at Wikipedia

2 Live Crew's music is intentionally misogynistic and crude, and at least one federal court ruled that it was obscene and could be banned under a test for obscenity called the *Miller* test.

The three-part *Miller* test was developed in the 1973 case *Miller v. California*. It has three parts:

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

The work is considered obscene only if all three conditions are satisfied.

We will discuss. It's a great story (2 Live Crew versus the Broward County Sheriff's Office) and an excellent tutorial on how the famous *Miller* test for obscenity works in the real world.

Child Pornography

In *New York v. Ferber*, 58 U.S. 747 (1982), the U.S. Supreme Court unanimously ruled that the State of New York could ban the sale of material depicting children engaged in sexual activity.

Child pornography, the court said, is unprotected speech, not because it is obscene but because actual children are harmed in the making of it, and the resulting product provides a permanent record of the harm done, capable of inflicting grievous damage on child actors long afterwards.

Which raised the question: What about virtual child pornography, in which no actual children are used as actors?

Ashcroft v. Free Speech Coalition

U.S. Supreme Court (2002)

- case at Google Scholar
- case at Wikipedia

Justice Kennedy, delivered the opinion of the Court.

Excerpts from the *Ashcroft* opinion:

We consider in this case whether the Child Pornography Prevention Act of 1996 ("the CPPA") . . . abridges the freedom of speech. The CPPA extends the federal prohibition against child pornography to sexually explicit images that appear to depict minors but were produced without using any real children. The statute prohibits, in specific circumstances, possessing or distributing these images, which may be created by using adults who look like minors or by using computer imaging. The new technology, according to Congress, makes it possible to create realistic images of children who do not exist. See Congressional Findings, notes following 18 U. S. C. 2251.

By prohibiting child pornography that does not depict an actual child, the statute goes beyond *New York* v. *Ferber,* 458 U. S. 747 (1982), which distinguished child pornography from other sexually explicit speech because of the State's interest in protecting the children exploited by the production process. See *id.,* at 758. As a general rule, pornography can be banned only if obscene, but under *Ferber,* pornography showing minors can be proscribed whether or not the images are obscene under the definition set forth in *Miller* v. *California,* 413 U. S. 15 (1973). *Ferber* recognized that "[t]he *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children." 458 U. S., at 761.

While we have not had occasion to consider the question, we may assume that the apparent age of persons engaged in sexual conduct is relevant to whether a depiction offends community standards. Pictures of young children engaged in certain acts might be obscene where similar depictions of adults, or perhaps even older adolescents, would not. The CPPA, however, is not directed at speech that is obscene; Congress has proscribed those materials through a separate statute. 18 U. S. C. 1460-1466. Like the law in *Ferber,* the CPPA seeks to reach beyond obscenity, and it makes no attempt to conform to the *Miller* standard. For instance, the statute would reach visual depictions, such as movies, even if they have redeeming social value.

The principal question to be resolved, then, is whether the CPPA is constitutional where it proscribes a significant universe of speech that is neither obscene under *Miller* nor child pornography under *Ferber* . . . .

As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits;

it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children. . . . While these categories may be prohibited without violating the First Amendment, none of them includes the speech prohibited by the CPPA. In his dissent from the opinion of the Court of Appeals, Judge Ferguson recognized this to be the law and proposed that virtual child pornography should be regarded as an additional category of unprotected speech. See 198 F. 3d, at 1101. It would be necessary for us to take this step to uphold the statute.

As we have noted, the CPPA is much more than a supplement to the existing federal prohibition on obscenity. Under *Miller* v. *California*, 413 U. S. 15 (1973), the Government must prove that the work, taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value. . . . The CPPA, however, extends to images that appear to depict a minor engaging in sexually explicit activity without regard to the *Miller* requirements. The materials need not appeal to the prurient interest. Any depiction of sexually explicit activity, no matter how it is presented, is proscribed. The CPPA applies to a picture in a psychology manual, as well as a movie depicting the horrors of sexual abuse. It is not necessary, moreover, that the image be patently offensive. Pictures of what appear to be 17-year-olds engaging in sexually explicit activity do not in every case contravene community standards.

The CPPA prohibits speech despite its serious literary, artistic, political, or scientific value. The statute proscribes the visual depiction of an idea—that of teenagers engaging in sexual activity—that is a fact of modern society and has been a theme in art and literature throughout the ages. Under the CPPA, images are prohibited so long as the persons appear to be under 18 years of age. This is higher than the legal age for marriage in many States, as well as the age at which persons may consent to sexual relations . . . . (48 States permit 16-year-olds to marry with parental consent) . . . . (in 39 States and the District of Columbia, the age of consent is 16 or younger). It is, of course, undeniable that some youths in sexual activity before the legal age, either on their own inclination or because they are victims of sexual abuse.

Both themes–teenage sexual activity and the sexual abuse of children–have inspired countless literary works. William Shakespeare created the most famous pair of teenage lovers, one of whom is just 13 years of age. See Romeo and Juliet, act I, sc. 2, l. 9 ("She hath not seen the change of fourteen years"). In the drama, Shakespeare portrays the relationship as something splendid and innocent, but not juvenile. The work has inspired no less than 40 motion pictures, some of which suggest that the teenagers consummated their relationship. *E.g.*, Romeo and Juliet (B. Luhrmann director, 1996). Shakespeare may not have written sexually explicit scenes for the Elizabethan audience, but were modern directors

to adopt a less conventional approach, that fact alone would not compel the conclusion that the work was obscene.

Contemporary movies pursue similar themes. Last year's Academy Awards featured the movie, Traffic, which was nominated for Best Picture. The film portrays a teenager, identified as a 16year-old, who becomes addicted to drugs. The viewer sees the degradation of her addiction, which in the end leads her to a filthy room to trade sex for drugs. The year before, American Beauty won the Academy Award for Best Picture. In the course of the movie, a teenage girl engages in sexual relations with her teenage boyfriend, and another yields herself to the gratification of a middle-aged man. The film also contains a scene where, although the movie audience understands the act is not taking place, one character believes he is watching a teenage boy performing a sexual act on an older man.

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 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. . . .

Under *Miller,* the First Amendment requires that redeeming value be judged by considering the work as a whole. Where the scene is part of the narrative, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive. . . .

For this reason, and the others we have noted, the CPPA cannot be read to prohibit obscenity, because it lacks the required link between its prohibitions and the affront to community standards prohibited by the definition of obscenity.

The Government seeks to address this deficiency by arguing that speech prohibited by the CPPA is virtually indistinguishable from child pornography, which may be banned without regard to whether it depicts works of value. . . .

Where the images are themselves the product of child sexual abuse, *Ferber* recognized that the State had an interest in stamping it out without regard to any judgment about its content. . . .

The production of the work, not its content, was the target of the statute. The fact that a work contained serious literary, artistic, or other value did not excuse

the harm it caused to its child participants. It was simply "unrealistic to equate a community's toleration for sexually oriented materials with the permissible scope of legislation aimed at protecting children from sexual exploitation."

Ferber upheld a prohibition on the distribution and sale of child pornography, as well as its production, because these acts were "intrinsically related" to the sexual abuse of children in two ways. First, as a permanent record of a child's abuse, the continued circulation itself would harm the child who had participated. Like a defamatory statement, each new publication of the speech would cause new injury to the child's reputation and emotional well-being. Second, because the traffic in child pornography was an economic motive for its production, the State had an interest in closing the distribution network. "The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." Under either rationale, the speech had what the Court in effect held was a proximate link to the crime from which it came. . . .

In contrast to the speech in *Ferber,* speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not "intrinsically related" to the sexual abuse of children, as were the materials in *Ferber.* While the Government asserts that the images can lead to actual instances of child abuse, see *infra,* at 251-254, the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.

The Government says these indirect harms are sufficient because, as *Ferber* acknowledged, child pornography rarely can be valuable speech. See 458 U. S., at 762 ("The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*"). This argument, however, suffers from two flaws. First, *Ferber* 's judgment about child pornography was based upon how it was made, not on what it communicated. The case reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment. See *id.,* at 764-765 ("[T]he distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection").

The second flaw in the Government's position is that *Ferber* did not hold that child pornography is by definition without value. On the contrary, the Court recognized some works in this category might have significant value, see *id.,* at 761, but relied on virtual images—the very images prohibited by the CPPA—as an alternative and permissible means of expression: "[I]f it were necessary for

literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative." *Id.,* at 763. *Ferber,* then, not only referred to the distinction between actual and virtual child pornography, it relied on it as a reason supporting its holding. *Ferber* provides no support for a statute that eliminates the distinction and makes the alternative mode criminal as well. . . .

The Government submits further that virtual child pornography whets the appetites of pedophiles and encourages them to engage in illegal conduct. This rationale cannot sustain the provision in question. The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. The government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." . . .

First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.

To preserve these freedoms, and to protect speech for its own sake, the Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct. . . .

Finally, the Government says that the possibility of producing images by using computer imaging makes it very difficult for it to prosecute those who produce pornography by using real children. Experts, we are told, may have difficulty in saying whether the pictures were made by using real children or by using computer imaging. The necessary solution, the argument runs, is to prohibit both kinds of images. The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down.

The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse. "[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . . ."

In sum, [the CPPA] covers materials beyond the categories recognized in *Ferber* and *Miller,* and the reasons the Government offers in support of limiting the freedom of speech have no justification in our precedents or in the law of the First Amendment. The provision abridges the freedom to engage in a substantial amount of lawful speech. For this reason, it is overbroad and unconstitutional . . . .

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Indecency

Just as we get comfortable with the notion of categories, and the notion that speech is either protected or unprotected, along comes a category of speech the Federal Commmunications Commission (FCC) wishes to not ban, but REGULATE.

FCC v. Pacifica Foundation

U.S. Supreme Court (1978)

- case at Google Scholar
- George Carlin's Seven Dirty Words routine.

In the 1970s, comedian George Carlin was famous for his "Filthy Words" routine aka "The Seven Words You Can't Say On Television." You may listen to the routine by clicking on the bulleted link above, but if such language offends, please don't click on it.

In 1973, WBAI a Pacifica Foundation FM radio station in New York City played George Carlin's routine on the radio at about 2pm in the afternoon. A father and his young son heard the routine on the radio while driving in their pickup truck. The father complained to the FCC because he was suprised to hear such language on the radio and was not happy about that his son had heard it.

The FCC sent a letter of reprimand to the Pacifica Foundation censuring the radio station for violating FCC regulations which prohibited broadcasting indecent material.

The case went to the U.S. Supreme Court which upheld the FCC action in 1978, by a vote of 5 to 4, ruling that the routine was "indecent but not obscene". The Court said that the FCC could prohibit such broadcasts during hours when children were likely to be in the audience, and gave the FCC broad leeway to determine what constituted indecency in different contexts.

The Court held that the government could regulate indecency on radio and televsion because it had a compelling interest in:

- Shielding children from potentially offensive material, and
- Ensuring that unwanted speech does not enter one's home.

That is why to this day, we don't normally hear profanity or "indecency" on television or radio between the hours of 6am and 10pm.

The FCC defines obscenity, profanity and indecency at its website.

Some Questions

1. Is George Carlin's speech protected speech? Is it obscene? What exactly does "indecency" mean?
2. When Bono says, "This is really really fucking brilliant" during a prime time TV broadcast at the 2003 Golden Globe awards, is that obscene? Is it indecent?

Totally Optional Reading

- Eugene Volokh on the meaning of "Congress shall make no law . . .". If the the tiny print bothers you, try Readability.
- Congress Shall Make No Law . . ., by Richard Dooling
- ACLU: Freedom of Expression in the Arts & Entertainment
- *The Atlantic:* "The Most Powerful Dissent in American History" (a book that reveals precisely how and why Oliver Wendell Holmes changed his mind about the first amendment).
- *The Atlantic:* "It's Time to Stop Using the 'Fire in a Crowded Theater' Quote" (A nice take on the *US v. Schenk* and how it may have led to Holmes' opinion in *Abrams*).
- Fox Urges End to Broadcast Indecency Limits
- Highest criminal court in Texas strikes down "improper photography" statute

Reference/Footnote Cases

In class, I may also refer to one or more the cases listed below. Again, the links simply provide more information if you are curious.

- *Yahoo! Inc. v. La Ligue Contre Le Racisme et l'antisemitisme (LICRA),*.
- *Joseph Burstyn, Inc. v. Wilson*.
- *Brandenberg v. Ohio*.
- *New York Times Co. v. Sullivan*
- *Miller v. California*, U.S. Supreme Court (1973)
- The *Miller* test at Wikipedia.
- *New York v. Ferber*.
- *American Booksellers v. Hudnut*.

Changelog