

# Lawyers For The Talent

Entertainment Law

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# First Amendment - Obscenity

## Obscenity

Most easily described as “hard core pornography,” obscenity gets its own category of speech historically unprotected by the First Amendment. The word “obscenity” sounds positively antique in the Information Age, where pornography is widely available via the Internet, and obscenity prosecutions are as rare as new video cassette tapes. But for several decades in the second half of the last century, the Supreme Court felt its way toward a working definition of [obscenity](#) by deciding, case-by-case, whether various films were obscene.

## Movie Day

In [The Brethren: Inside The Supreme Court \(1979\)](#), a 1979 book by Bob Woodward and Scott Armstrong, the authors provide a “behind-the-scenes” account of the United States Supreme Court during Warren Burger’s early years as Chief Justice of the United States, including the Court’s struggles to formulate its obscenity doctrine. As hundreds of obscenity cases made their way through the lower courts, some of the Justices and their clerks instituted “[movie day](#)” at the United States Supreme Court, a weekly gathering at which the law clerks and the Justices sat down to eat popcorn and view porn films, such as *Vixen* and *Fanny Hill (Memoirs of a Woman of Pleasure)*, for the cases awaiting decisions. Justice Hugo Black, who served from 1937 to 1971, always refused Movie Day by saying “if I want to go see that film, I should pay my money.” Justice Black and Justice William Douglas, who served from 1939 to 1975, did not participate in movie day because they believed that whatever was in movies about sex between consenting adults was protected by the First Amendment. Justice Harlan, who by the end of his tenure was nearly blind, “watched the films from the first row, a few feet from the screen, able only to make out the general outlines. His clerk or another Justice would describe the action. ‘By Jove,’ Harlan would explain. ‘Extraordinary.’” *The Brethren*

Justice Potter Stewart gave the most honest and memorable definition of obscenity 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 (“hard-core 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.

## Obscenity Versus Indecency

Students new to the First Amendment often expect that any definition of *obscenity* must include foul language or swear words, in the sense of, “then, the dastardly villain uttered an obscenity.” But the f-word and its kin are better described as *indecenty*, another legal category of speech with imprecise boundaries, [as the Federal Communications Commission \(FCC\) defines it](#).

As we’ll see later, obscenity trials are almost passé because of the advent of the Internet. The Internet finally allowed the porn industry to reach their customers without displaying their wares on movie marquee and in the magazine racks of gas stations, drug stores, and convenience stores. If grandma never catches even a glimpse of porn, then she never writes her congressman, even though the U.S. porn industry [generates over \\$10-\\$12 billion revenue in the US, and close to \\$100 billion globally](#)

Obscenity is still worth studying because it holds lessons in how legislatures try to pass laws against certain categories of speech, how courts interpret, uphold, or strike down those laws. 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.

For decades in the second half of the last century, obscenity was defined by the United States Supreme Court’s opinion in [Miller v. Californial](#) (US 1973). The obscenity in *Miller* were brochures containing graphic sexual images advertising pornography, and most modern obscenity cases involve videos depicting hard core pornography, but in the first half of the last century, the printed word alone was enough.

Less than fifty years ago, in [Kaplan v. California](#) (US 1973), the Supreme Court held that: “Obscene material in book form is not entitled to any First Amendment protection merely because it has no pictorial content.”

And less than thirty years ago, at least one federal district court in Florida ruled that 2 Live Crew’s “Nasty As They Wanna Be” was legally obscene, based not on any videos or images, but based on the lyrics. In his ruling, the judge carefully describes and applies the Supreme Court’s *Miller* test and concludes that 2 Live Crew’s music is obscene.

### *Skywalker Records, Inc. v. Navarro*

Federal District Court, SD Florida (1990)

- [case at Google Scholar](#)
- [how cited at Google Scholar](#)
- [case at Westlaw](#)
- [case at Wikipedia](#)
- [The Miller Test at Wikipedia](#)

GONZALEZ, District Judge.

This is a case between two ancient enemies: Anything Goes and Enough Already.

Justice Oliver Wendell Holmes, Jr. observed in [Schenck v. United States \(US 1919\)](#), that the First Amendment is not absolute and that it does not permit one to yell “Fire” in a crowded theater. Today, this court decides whether the First Amendment absolutely permits one to yell another “F” word anywhere in the community when combined with graphic sexual descriptions.

Two distinct and narrow issues are presented: whether the recording *As Nasty As They Wanna Be* (*Nasty*) is legally obscene; and second, whether the actions of the defendant Nicholas Navarro (Navarro), as Sheriff of Broward County, Florida, imposed an unconstitutional prior restraint upon the plaintiffs’ right to free speech.

It is before the court following a trial on the merits held May 14 and May 15, 1990. The court has considered the pleadings, exhibits, the testimony of the witnesses, plus argument of able counsel. By the stipulation of the parties, the trial record also includes all evidence and argument presented at the plaintiffs’ preliminary injunction hearing held April 19, 1990.

## The Plaintiffs

The plaintiff Skyywalker Records, Inc. (Skyywalker) is a Florida corporation headquartered in Miami, Florida. The plaintiffs Luther Campbell, Mark Ross, David Hobbs, and Chris Wongwon, constitute the group known as “2 Live Crew” whose recording, *As Nasty As They Wanna Be*, is the subject of this lawsuit. Luther Campbell is also the President, Secretary, sole shareholder, and sole director of Skyywalker.

The plaintiffs have brought this action under section 1983, Title 42 of the United States Code, which provides a federal statutory remedy for unlawful deprivations of federal rights including those liberties guaranteed under the United States Constitution. The plaintiffs also seek a declaration of their legal rights, under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201(a), and injunctive relief under section 2202(b) thereof. This court has previously denied the plaintiffs’

motion for a preliminary injunction by *ore tenus* order entered April 19, 1990. There is no prayer for money damages.

Because this is a civil action, the party with the burden of proof must prevail by a preponderance of the evidence. On the issue of obscenity, the defendant Navarro has the burden of proof. As to the prior restraint claim, however, the plaintiffs have the burden to prove, beyond a preponderance of the evidence, that the defendant's actions were unconstitutional.

It must be emphasized at the outset that this decision does not criminalize the plaintiffs' conduct, nor does it charge anyone with a crime. That is a matter for the police and the criminal courts to determine. Whether the plaintiffs are guilty of a crime can only be decided if criminal charges are brought, a trial by jury conducted, and all other due process requirements have been met. Whether *As Nasty as They Wanna Be* is *criminally* obscene is left for the determination of another court on another day.

## The Facts

The recording *As Nasty As They Wanna Be* was released to the public by 2 Live Crew in 1989. To date, public sales have totalled approximately 1.7 million copies. The recording is available in various formats including phonograph records, cassette tapes, and compact discs. 2 Live Crew has also produced a recording entitled *As Clean As They Wanna Be (Clean)* which has sold approximately 250,000 copies. Although neither party introduced *Clean* into evidence, it apparently contains the same music as *Nasty* but without the explicit sexual lyrics.

In mid-February 1990, the Broward County Sheriff's office began an investigation of the *Nasty* recording. The investigation began in response to complaints by South Florida residents.

Broward County Deputy Sheriff Mark Wichner was assigned to the case. On February 26, 1990, he traveled to Sound Warehouse, a Broward County retail music store, and purchased a cassette tape copy of the *Nasty* recording. The tape was purchased from an open display rack marked "Rap Music", easily accessible to all of Sound Warehouse's customers regardless of age.

Deputy Wichner listened to the *Nasty* recording, had six of the eighteen songs transcribed, and prepared an affidavit detailing these facts requesting that the Broward County Circuit Court find probable cause that the *Nasty* recording was legally obscene. On February 28, 1990, Deputy Wichner submitted the affidavit, an attached transcript of the six songs, and the tape cassette of the *Nasty*

recording to the duty judge of the Broward County Circuit Court, the Honorable Mel Grossman. The communications between Deputy Wichner and Judge Grossman were limited to the filing of the affidavit, transcript, and tape cassette. Several days later, Judge Grossman's chambers contacted the deputy and requested further information concerning the location in Sound Warehouse of the *Nasty* recording and its accessibility to the public. Deputy Wichner communicated that information to the judge.

On March 9, Judge Grossman issued an order after reviewing the *Nasty* recording "in its entirety." The judge explicitly found probable cause to believe this recording was obscene under section 847.011 of the Florida Statutes and under applicable case law.

The Broward County Sheriff's office received and copied the order, and distributed it county wide to retail establishments that might be selling the *Nasty* recording. It decided to "warn the stores as a matter of courtesy" rather than make an initial arrest because, according to Deputy Wichner's testimony, such conduct would have been overaggressive. The Sheriff's office has not opened any investigations of other musical recordings because of the absence of citizen complaints.

Thereafter, Deputy Wichner re-visited the store where he had purchased the original recording plus another Sound Warehouse outlet and a store called Uncle Sam's Records. On these visits, the deputy wore a jacket marked "Broward County Sheriff" and displayed his badge in plain view. He spoke with a manager in each of the three stores, provided them with a copy of Judge Grossman's order, and told them, in a friendly conversational tone, that they should refrain from selling the *Nasty* recording. The managers were warned that further sales would result in arrest and that if convicted, the penalty for selling to a minor was a felony, and a misdemeanor if sold to an adult. Between fifteen and twenty different Broward County stores were personally visited by the Sheriff's office, and the evidence indicates that each of the visits was conducted in the same manner as were Deputy Wichner's three stops.

The Sheriff's office warnings were very effective. Within days, all retail stores in Broward County ceased offering the *Nasty* recording for sale. Those stores not directly visited by deputy sheriffs pulled the recording from their shelves after hearing about the visits from television and radio reports. Some stores continued to sell the *Clean* recording. *Nasty* was no longer sold even by stores having a policy of specially marking the recording with a warning, and of not selling it to minors. 2 Live Crew also includes a small statement on the front of the paper insert to their recording, as follows: "WARNING: EXPLICIT LANGUAGE CONTAINED".

The Broward County Sheriff's office took no further action because there was no information that any store was selling the *Nasty* recording.

On March 16, 1990, the plaintiffs filed this action in federal district court. On March 27, 1990, Sheriff Nicholas Navarro filed an *in rem* proceeding in Broward County Circuit Court against the *Nasty* recording seeking a judicial determination that it was obscene under state law. *See Navarro v. The Recording "As Nasty As They Wanna Be"*, case number 90-09324(12) (Reasbeck). There is no evidence of the status of the state case including whether a trial date has been set. No criminal proceedings against either the recording or the group 2 Live Crew have been instituted.

### Obscenity And The First Amendment

The First Amendment to the United States Constitution provides that "Congress shall make no law ... abridging the freedom of speech." The Fourteenth Amendment declares that "no State shall ... deprive any person of ... liberty ... without due process of law." It is now well-established that this "liberty" includes the right to free speech. *Chaplinsky v. New Hampshire*, *Miller v. California*. Hence, neither the federal nor the state governments may abridge this Constitutional right.

The First Amendment is one of our most sacred liberties since freedom of thought and speech are the key to the preservation of all other rights. Free speech plays a critical role in furthering self-government, in encouraging individual self-realization, and fostering society's search for truth via exposure to a "marketplace of ideas."

To protect that sacred right, the judiciary carefully scrutinizes government regulation to determine if such regulation impermissibly infringes upon it. When legislative or executive action is directed at the content of one's speech, it will pass judicial review only upon a showing that the action is designed to further a compelling governmental interest by narrowly drawn means necessary to achieve the end.

The First Amendment's guaranty is not absolute, however. *See, e.g., Chaplinsky*. Although the amendment is unconditional on its face, the fact that there were accepted state limits on speech at the time it was ratified indicates that the "phrasing of the First Amendment was not intended to protect every utterance."

This is certainly true about speech on sexual subjects.

Obscene speech has *no* protection under the First Amendment. The rationale is

simple: the message conveyed by obscene speech is of such slight social value that it is always outweighed by the compelling interests of society, as manifested in the laws enacted by its elected representatives.

Sex has been called “a great and mysterious motive force in human life”. Because of its power, both federal and state governments have chosen to regulate its abuse. For example, states have banned prostitution, incest, rape, and other sexually related conduct. These prohibitions are no different than a ban on obscenity. The distinction between regulations of conduct and speech does not invalidate obscenity laws. As noted in *Miller v. California*, “Sex and nudity many not be exploited without limit by films and pictures exhibited or sold in places of public accomodation any more than live sex and nudity can be exhibited or sold without limit in such public places.”

The state may also have an important interest in protecting minors and unwilling or sensitive adults from exposure to obscene materials. See *Miller*. The plaintiffs attempt to diminish the state’s interest by relying upon language in *Butler v. Michigan* (US 1957) that if materials that are only obscene as to minors are banned, a state’s statute would “reduce the adult population ... to reading only what is fit for children.” This decision only applies, however, to governmental regulations of materials which are not obscene as to adult audiences. Certainly it is not improper for a state to protect children from materials which are too lewd for even adult consumption.

Words, including musical lyrics, are powerful. As noted in *Paris Adult Theatre I*:

If there is a well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality, and develop character, can we then say that a state legislature may not act on the corollary assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior?

Even though there is no Constitutional protection for obscenity and there are potential governmental interests at stake, it does not necessarily mean that obscene speech is illegal. Indeed, state governments could legalize obscenity including use by consenting adults.

The government must first criminalize obscenity before it is outlawed. Indeed, if there were no statutory bans enacted by the legislature, courts would not have to decide what is and what is not obscene.

The Florida Legislature *has* acted, however. It has enacted a statutory scheme outlawing obscenity. It is apparent that this legislation is intended to regulate



obscenity to the maximum extent allowed by the Constitution of the United States. Florida Statutes, tracks the language of the controlling case of *Miller v. California* in defining obscenity for purposes of the state ban.

The Florida Legislature has enacted a comprehensive set of laws. The primary provision ... *criminalizes* the distribution, sale, or production of any obscene thing including a “recording” which can be “transmuted into auditory ... representations.” Subsection (2) similarly makes it a *crime* for a person to knowingly have an obscene thing, including musical recordings, in his possession. Other sections make it *criminal* to transport obscenity into the state or to create, deliver, or publish obscenity. There are several provisions which specifically apply to child pornography. Finally, others prohibit obscene programming on cable television during promotional periods and require ratings on video tapes rented and sold to the public.

An argument underlying the plaintiffs’ position is that the obscenity or non-obscenity of any material should not be a concern of the criminal law, but rather should be left to the free market of ideas. Let each individual member of the public decide whether they wish to buy the material. 2 Live Crew has labeled their work with an explicit warning. They claim this label allows adults who would object to the recording’s contents to exercise the consumer’s right of free choice to not buy the product. To use the example of television, if the viewer does not like what he sees on Channel X, he may switch to Channel Y or turn off the set. In the case of obscene music, people who do not want to listen to obscenity do not have to buy it.

This is the argument of those absolutists who believe *all speech, regardless of its content*, is protected by the First Amendment. Such individuals label all regulation of speech as “censorship” and “paternalism”. This absolutist view finds strength among those who believe rugged individualism is a valued virtue, if not a protected right that everyone should be permitted to “do their own thing.”

This is a facially appealing argument. The problem is that it is not the law.

Florida has declared obscenity to be a crime. To repeat, violation of the laws against obscenity is as much against the law as assault, rape, kidnapping, robbery, or any other form of behavior which the legislature has declared criminal.

The absolutists and other members of the party of Anything Goes should address their petitions to the Florida Legislature, not to this court. If they are sincere let them say what they actually mean—Lets’ Legalize Obscenity!

To be redundant, obscenity is not a protected form of speech under the U.S. Constitution, with or without voluntary labeling. *It is a crime*. If the people of Florida, want to legalize obscenity, they have every right to do so. It is much

easier to criticize the law, however, than it is to work to repeal it. As the Supreme Court stated in *Paris Adult Theatre I*:

It is argued that individual “free will” must govern, even in activities beyond the protection of the First Amendment and other constitutional guarantees of privacy, and that government cannot legitimately impede an individual’s desire to see or acquire obscene plays, movies, and books. We do indeed base our society on certain assumptions that people have the capacity for free choice. Most exercises of individual free choice—those in politics, religion, and expression of ideas—are explicitly protected by the Constitution. Totally unlimited play for free will, however, is not allowed in our or any other society ...

The States, of course, may follow ... a “laissez-faire” policy and drop all controls on commercialized obscenity, if that is what they prefer, just as they can ignore consumer protection in the marketplace, but nothing in the Constitution *compels* the States to do so with regard to matters falling within state jurisdiction.

This court’s role is merely to interpret the law to determine whether the particular material is obscene. If the inquiry yields an affirmative response, judicial review is limited to whether the means chosen to implement the law are rationally related to the goal of the legislation. It is not the role of this court to sit as a Super-Legislature to second-guess whether the best possible law was passed. This court must also refrain from substituting its own choice of the appropriate means to outlaw obscenity, for this is a matter of legislative discretion subject only to the boundaries of the Constitution and the conscience of the legislators. And if a statute only regulates unprotected obscenity, mere rationality is sufficient to satisfy due process.

In an era where the law and society are rightfully concerned with the rights of minorities, it should not be overlooked nor forgotten that majorities also have rights.

In our democratic form of government, citizens elect representatives to protect their interests and promote their welfare. State legislatures have the authority to exercise the governmental police power which reaches all manner of human conduct. As already seen, state regulation may reach some of the most intimate aspects of man’s existence including sex. When man enters into a society and becomes a member thereof, he necessarily submits to its laws and thereby must give up the unfettered liberty he would otherwise possess in his natural state.

In sum, if persons subscribe to the view that obscenity should be legalized, they

should take their petitions to Tallahassee, the Florida capital, not to the steps of the U.S. courthouse.

The people of Florida have made obscenity a crime. Individuals are not free to disobey or disregard the law. The law is not a smorgasbord where people are free to pick and choose among which laws they will obey and which they will reject. Neither is it a channel selector available to every member of the public to use as they deem fit. As noted in the Pattern Instructions of the Eleventh Circuit, jurors in deciding the rights and liberties of their fellow citizens “must ... follow the law whether ... [they] agree with that law or not.”

Men and women in good faith may agree or disagree as to whether obscenity should be prohibited. They can argue that the obscenity statutes should or should not be repealed. In the meantime, however, the law must be obeyed and the Sheriff has a duty to enforce it. Indeed, Florida’s Legislature has mandated that all sheriffs in the state are to “vigorously enforce” the obscenity laws. *See* FLA.STAT.ANN. § 847.011(9) (Supp.1990).

### **The Miller v. California Test**

In deciding whether a specific work is or is not obscene, the court must apply the controlling test enunciated in *Miller v. California*. To be obscene, there must be proof of all three of the following factors: (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest, (2) measured by contemporary community standards, the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

### **The Relevant Community**

Both the first and second elements of *Miller* require application of “contemporary community standards.” The issues of the size of the appropriate community, its composition, and the view of the average person in that group are all questions of fact to be decided by the trier of fact, which is the court in this case.

Both parties Apparently assumed that the relevant community was only Broward County, Florida. Neither litigant presented any evidence to support this assumption, which was apparently based upon the jurisdiction of the Broward County Sheriff and the County lines. However, the boundaries of the relevant community under *Miller* are a matter for judicial, not legislative, determination.

This court finds that in assessing whether this work is obscene, the relevant community is the area of Palm Beach, Broward, and Dade Counties.

If the relevant community is Broward, Dade, and Palm Beach counties, the next step is to determine the composition of the citizens of this area. The court, as the finder of fact, must rely upon its own personal knowledge as the parties failed to present evidence on this point. In a word, this area is remarkable for its diversity. The three counties are a mecca for both the very young and the very old. Because of the beaches and the moderate year-round climate, this area includes young persons establishing homes and older residents retiring to enjoy life under the sun. There are both families and single individuals residing in the communities. Generally, the counties are heterogeneous in terms of religion, class, race, and gender.

### **The Average Person Standard**

The next inquiry is more difficult because this court must determine what are the standards for determining prurient interest and patent offensiveness in Palm Beach, Dade, and Broward Counties. The fact that the state legislature has enacted laws prohibiting obscenity is certainly relevant and entitled to great weight. The state's anti-obscenity stance as a whole, however, is overinclusive because other communities outside the three counties are included in the majority who passed the legislation.

In determining the views of the "average person" in this area, the court has *not* focused only on the views of the most tolerant or the most sensitive individuals. The "average person" does not necessarily represent any one segment of the community. It is a legal concept whereby a single perspective is derived from the aggregation or average of everyone's attitudes in the area including persons with differing degrees of tolerance (community under *Miller* is made up of all adults in the area including the most sensitive). The court has not considered minors in its considerations because there was not sufficient evidence adduced at trial that the music was targeted at such persons or that it actually reached children.

This court finds that the relevant community standard reflects a *more* tolerant view of obscene speech than would other communities within the state. This finding of fact is based upon this court's personal knowledge of the community. The undersigned judge has resided in Broward County since 1958. As a practicing attorney, state prosecutor, state circuit judge, and currently, a federal district judge, the undersigned has traveled and worked in Dade, Broward, and Palm Beach. As a member of the community, he has personal knowledge of this area's demographics, culture, economics, and politics. He has attended public

functions and events in all three counties and is aware of the community's concerns as reported in the media and by word of mouth. In almost fourteen years as a state circuit judge, the undersigned gained personal knowledge of the nature of obscenity in the community while viewing dozens, if not hundreds of allegedly obscene films and other publications seized by law enforcement.

The court does not adopt the plaintiffs' position that these three counties can be labeled as "tolerant" per se as opposed to some degree thereof. Neither the trier of fact's personal knowledge nor the plaintiffs' evidence supports such a conclusion. The plaintiffs argue that the lack of written complaints in the *Nasty* investigation file created by the Broward Sheriff's office is evidence of a tolerant community standard. While this fact is entitled to some weight, it is far from significant. There may be many reasons why concerned citizens have not complained. For example, the *Nasty* recording was not released until 1989 and it takes time for even a popular musical release to reach the public consciousness. Although the Sheriff has the duty to enforce the obscenity laws regardless of community protest, Deputy Wichner's explanation of why this particular album was singled out can reasonably be linked to significant community discontent, whether communicated by telephone calls, anonymous messages, or letters to the police. Furthermore, the vast majority of complaints in the file, although not exclusively from Broward County, were residents of the relevant community.

Further, the plaintiffs' reliance upon the admission of other sexually explicit works is also not entitled to great weight in determining community standards. First, the Supreme Court has recognized that this type of evidence does not even have to be considered even if the comparable works have been found to be nonobscene. In this case, there is no evidence that the comparable materials are not themselves obscene. More importantly, most of the materials are simply irrelevant. This case involves the alleged obscenity of a musical recording. Evidence of depictions of sexual conduct in pictures, moving or still, is not substantially equivalent to musical lyrics.

The most comparable works introduced are the sexually explicit writings in the various books and magazines, the audio tape entitled *Raw* by Eddie Murphy, and the double cassette tape recording by Andrew Dice Clay. All three of these works focus upon a verbal message analogous to the format in the *Nasty* recording. The court does give these particular works some weight.

The plaintiffs also raise several collateral arguments as to why this court is allegedly unable to determine the community standards. They claim that the defendant's failure to introduce evidence at the trial including expert testimony is fatal. The plaintiffs also allege that this court's opinion will only reflect the personal opinion of the undersigned judge, not the relevant community. They

support this argument by pointing to the court's alleged refusal to empanel a jury in this case. [trial by jury arguments omitted].

The plaintiffs' claim that this court cannot decide this case without expert testimony and the introduction of specific evidence on community standards is also without merit. The law does not require expert testimony in an obscenity case. The defendant introduced the *Nasty* recording into evidence. As noted by the Supreme Court in *Paris Adult Theatre I*, when the material in question is not directed to a "bizarre, deviant group" not within the experience of the average person, the best evidence is the material, which "can and does speak for itself."

In deciding this case, the court's decision is not based upon the undersigned judge's personal opinion as to the obscenity of the work, but is an application of the law to the facts based upon the trier of fact's personal knowledge of community standards. In other words, even if the undersigned judge would not find *As Nasty As They Wanna Be* obscene, he would be compelled to do so if the community's standards so required.

The true basis of the plaintiffs' argument is that the legal standard of the "community" and the "average person" are too nebulous to apply to an issue of constitutional law. This position ignores the fact that the law does not require absolute certainty as to its determinations. The standard of proof is adjusted upward or downward to reflect the balance between the competing rights of individuals and society. In civil cases, the law gives effect to a determination based on a preponderance of the evidence. Even in criminal matters where a person can lose his liberty, property, and even his life, there is no requirement that the government prove guilt beyond all possible doubt. As noted in *Hamling v. United States* (US 1974), "It is common experience that different juries may reach different results ... This is one of the consequences we accept under our jury system." The same holds true when the court is the finder of fact in a bench trial. Application of the "community" and "average person" standards are no different than that of applying the standard of the "reasonable person" used in negligence and tort law.

### **The First Miller Test: Prurient Interest**

This court finds, as a matter of fact, that the recording *As Nasty As They Wanna Be* appeals to the prurient interest. The Supreme Court has defined prurient as "material having a tendency to excite lustful thoughts." *Roth*. Appeals only to "normal, healthy sexual desires" are not adequate to meet the test. *Brockett v. Spokane Arcades, Inc.* (US 1985). The material must exhibit a "shameful or morbid interest in nudity, sex, or excretion".

*Nasty* appeals to the prurient interest for several reasons. First, its lyrics and the titles of its songs are replete with references to female and male genitalia, human sexual excretion, oral-anal contact, fellatio, group sex, specific sexual positions, sadomasochism, the turgid state of the male sexual organ, masturbation, cunnilingus, sexual intercourse, and the sounds of moaning. Florida's Legislature has provided a valuable source of evidence in the form of its obscenity statutes for determining what is sexual conduct. Florida Statutes define "sexual conduct" to include "actual or simulated sexual intercourse, deviate sexual intercourse ... masturbation ... sadomasochistic abuse; [or] actual lewd exhibition of the genitals." Florida Statutes define deviate sexual intercourse as sexual conduct between unmarried persons involving contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva. Another section defines sadomasochistic abuse as satisfaction from sadistic violence derived by inflicting harm upon another. These definitions cover most, if not all, of the sexual acts depicted in *As Nasty As They Wanna Be*.

Furthermore, the frequency and graphic description of the sexual lyrics evinces a clear intention to lure hearers into this activity. The depictions of ultimate sexual acts are so vivid that they are hard to distinguish from seeing the same conduct described in the words of a book, or in pictures in periodicals or films.

It is also noteworthy that the material here is music. It is true that it would be difficult, albeit not impossible, to find that mere sound without lyrics is obscene. Music is sufficiently subjective that reasonable persons could disagree as to its meaning. But, the focus of the *Nasty* recording is its lyrics. Based on the evidence at trial, music of the "rap" genre focuses upon verbal messages accentuated by a strong beat. 2 Live Crew itself testified that the *Nasty* recording was made to be listened and danced to. The evident goal of this particular recording is to reproduce the sexual act through musical lyrics. It is an appeal directed to "dirty" thoughts and the loins, not to the intellect and the mind.

The court has also given some, but not great, weight to the plaintiffs' commercial motive. Of course, the fact that the plaintiffs made a profit from the public distribution of the *Nasty* recording is not relevant in determining obscenity. However, the court can consider the manner in which the material was distributed and promoted to determine if the "leer of the sensualist" permeates the work. In *Ginzburg*, the court found that publishers of certain magazines and books had directed their advertising in such a way as to commercially exploit erotica solely for the sake of their prurient appeal. For example, the advertisements sent to potential customers "stressed the sexual candor of the respective publications, and openly boasted that the publishers would take full advantage of what they regarded [as] an unrestricted license allowed by law in the expression of sex and sexual matters." The Court went on to note that, "the

deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content."

Consideration of the creator's intent to appeal to the prurient interest is still a valid consideration today, even after *Miller v. California*.

The record at trial indicates that the plaintiffs' commercial exploitation of this work was done in a manner calculated to make a salacious appeal. The title of the recording, *As Nasty As They Want To Be*, in addition to the names of many of the songs and the illustration on the recordings' insert certainly fit within the confines of the *Ginzburg* case for materials "looking for titillation."

One of the more interesting points suggested by the evidence at trial, but not dwelt on by the defendant, was that 2 Live Crew made two apparently identical albums with the only difference being the sexually explicit lyrics. The plaintiffs' own expert, John Leland, testified that the *Nasty* recording, without the salacious lyrics, would not have been expected to sell more than 500,000 copies nationwide. To date, the *Nasty* version has sold 1.7 million copies. The identical recording sans sexual lyrics (*Clean*) has sold only 250,000 copies. The difference between the actual sales of the two recordings can reasonably be found to have been motivated by the "leer of the sensualist". The plaintiffs cannot claim they needed the vulgar lyrics to promote their message since the plaintiffs' own experts testified that music from neither the "rap" or "hip-hop" genre does not require the use of such language.

Finally, the plaintiffs rely upon testimony, both lay and expert, that the *Nasty* recording did not actually physically excite anyone who heard it and indeed, caused boredom after repeated play. However, based on the graphic deluge of sexual lyrics about nudity and sexual conduct, this court has no difficulty in finding that *As Nasty As They Wanna Be* appeals to a shameful and morbid interest in sex.

### **The Second Miller Test: Patently Offensive**

The court also finds that the second element of the *Miller* test is satisfied in that the *Nasty* recording is patently offensive. This is a question of fact, which must be measured by contemporary community standards. *Miller*.

It is quite true that not all speech with sex as its topic is obscene. The *As Nasty As They Wanna Be* recording is another matter.

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 ultimate sex acts. Furthermore, the frequency of the sexual lyrics must also be considered. With the exception of part B on Side 1, the entire *Nasty* recording is replete with explicit sexual lyrics. This is not a case of subtle references or innuendo, nor is it just “one particular scurrilous epithet” as in *Cohen v. California* (US 1971).

As already noted, Florida’s Legislature has defined obscene acts to include sadomasochistic sexual conduct, oral sex, and anal intercourse. In addition, Florida’s obscenity statutes are intended to have the broadest, constitutional scope. States may outlaw certain portrayals of sexual conduct and nudity if they constitute “hardcore pornography.” See *Jenkins v. Georgia* (US 1974). In *Jenkins*, the Supreme Court reversed a conviction for distribution of the film “Carnal Knowledge” which contained scenes of a woman with a bare midriff and several lovemaking sessions. This depiction was held by the Court to not be within the hardcore category. As noted by the Court,

While the subject matter of the picture is, in a broader sense, sex, and there are scenes in which sexual conduct including “ultimate sexual 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 whatever of the actors’ genitals, lewd or otherwise, during these scenes. There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the *Miller* standards.

In *Miller*, the Supreme Court gave two examples of the type of conduct subject to state regulation: “(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.” The conduct described in the *Nasty* recording is certainly within the scope of the Florida statutes. The state law, of course, is not dispositive on the question of whether this particular community would be patently offended, but it is entitled to significant weight.

While the above facts are sufficient to support a finding that this material is patently offensive, there are additional considerations that support such a finding. First, the *Nasty* lyrics contain what are commonly known as “dirty words” and depictions of female abuse and violence. It is likely that these offensive descriptions would not of themselves be sufficient to find the recording obscene. See, e.g., *American Booksellers Association, Inc. v. Hudnut* (7th Cir. 1985). When these terms are used with explicit sexual descriptions, however, they may be considered on the issue of patent offensiveness. Secondly, the material here is music which can certainly be more intrusive to the unwilling listener than other

forms of communication. Unlike a video tape, a book, or a periodical, music must be played to be experienced. A person can sit in public and look at an obscene magazine without unduly intruding upon another's privacy; but, even according to the plaintiffs' testimony, music is made to be played and listened to. A person laying on a public beach, sitting in a public park, walking down the street, or sitting in his automobile waiting for the light to change is, in a sense, a captive audience. While the law does require citizens to avert their ears when speech is merely offensive, they do not have an obligation to buy and use ear plugs in public if the state legislature has chosen to protect them from obscenity.

Finally, in determining whether the *Nasty* recording is patently offensive, it is again proper to consider the plaintiffs' commercial exploitation of sex to promote sales. As noted by the Supreme Court in *Ginzburg v. United States* (US 1966), representations of a publication as erotically arousing "would tend to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publications to those who are offended by such material." Such is the case here, as already discussed. Again, while this factor has not been given great weight, it is entitled to consideration.

### **The Third Miller Test: Social Value**

The final factor under *Miller* is whether the *Nasty* recording, taken as a whole, lacks serious literary, artistic, political, or scientific value. This factor is not measured by community standards. The proper inquiry is whether a reasonable person would find serious social value in the material at issue. The plaintiffs correctly note that the value of a work can pass muster under *Miller* if it has serious merit, measured objectively, even if a majority of the community would not agree.

As a preliminary matter, it is again important to note what this case is *not* about. Neither the "Rap" or "Hip-Hop" musical genres are on trial. The narrow issue before this court is whether the recording entitled *As Nasty As They Wanna Be* is legally obscene.

This is also not a case about whether the group 2 Live Crew or any of its other music is obscene. The third element of the *Miller* test focuses upon the social value of the particular work, not its creators. The fact that individuals of whom we approve hold objectionable ideas or that people of whom we do not approve hold worthy ideas does not affect judicial review of the value of the ideas themselves.

The Phillistines are not always wrong, nor are the guardians of the First Amendment always right.

This court must examine the *Nasty* recording for its content; the inquiry is objective, not *ad hominem*.

Finally, this court's role is not to serve as a censor or an art and music critic. If the *Nasty* recording has serious literary, artistic, political, or scientific value, it is irrelevant that the work is not stylish, tasteful, or even popular.

The plaintiffs themselves testified that neither their music nor their lyrics were created to convey a political message.

The only witness testifying at trial that there was political content in the *Nasty* recording was Carlton Long, who was qualified as an expert on the culture of black Americans. This witness first stated that the recording was political because the 2 Live Crew, as a group of black Americans, used this medium to express themselves. While it is doubtless true that *Nasty* is a product of the group's background, including their heritage as black Americans, this fact does not convert whatever they say, or sing, into political speech. Professor Long also testified that the following passages from the recording contained political content: a four sentence phrase in the song "Dirty Nursery Rhymes" about Abraham Lincoln, the word "man" in the Georgie Porgie portion of the same song, and the use of the device of "boasting" to stress one's manhood. Even giving these isolated lyrics the meaning attributed by the expert, they are not sufficient in number or significance to give the *Nasty* recording, as a whole, any serious political value.

In terms of science, Professor Long also suggested that there is cultural content in 2 Live Crew's recording which rises to the level of serious sociological value. According to this witness, white Americans "hear" the *Nasty* recording in a different way than black Americans because of their different frames of references. Long identifies three cultural devices evident in the work here: "call and response", "doing the dozens", and "boasting". The court finds none of these arguments persuasive.

The only examples of "call and response" in the *Nasty* recording are portions where males and females yell, in repetitive verse, "Tastes Great—Less Filling" and, in another song, assail campus Greek-letter group. The phrases alone have no significant artistic merit nor are they examples of black American culture. In the case of "Tastes Great—Less Filling", this is merely a phrase lifted from a beer commercial.

The device of "doing the dozens" is a word game composed of a series of insults escalating in their satirical content. The "boasting" device is a way for persons

to overstate their virtues such as sexual prowess.

While this court does not doubt that both “boasting” and “doing the dozens” are found in the culture of black Americans, these devices are also found in other cultures. “Doing the dozens” is commonly seen in adolescents, especially boys, of all races. “Boasting” seems to be part of the universal human condition.

Professor Long also cited to several different examples of literary devices such as rhyme and allusion which appear in *Nasty*, and points to the song title “Dick Almighty” as an example of the literary device of personification. This, of course, is nonsense regardless of the expert’s credentials. “A quotation from Voltaire in the fly leaf of a book”, noted the Supreme Court in *Miller*, “will not constitutionally redeem an otherwise obscene publication.”

Prior to *Miller*, the government had to demonstrate that a work was utterly without redeeming social value to be judged obscene. The present test is less stringent, only requiring proof of an absence of serious social worth. This leads to the plaintiffs’ strongest argument: that the *Nasty* recording has serious artistic value. This category of social worth is broad enough to include the value contributed by the political, literary, and cultural aspects of the particular work.

The plaintiffs stress that the *Nasty* recording has value as comedy and satire. Certainly, people can and do laugh at obscenity. The plaintiffs point to the audience reaction at trial when the subject recording was played in open court. The audience giggled initially, but the court observed that after the initial titillation, it fell silent.

In a society where obscenity is forbidden, it is human nature to want taste forbidden fruit. It is quite another thing to say that this aspect of humanity forms the basis for finding that *Nasty* has serious artistic value. Furthermore, laughter can express much more than enjoyment and entertainment. It is also a means of hiding embarrassment, concealing shame, and releasing tension. The fact that laughter was only heard at the time that the first song of the tape was played is probative on what the audience’s outbursts really meant. It cannot be reasonably argued that the violence, perversion, abuse of women, graphic depictions of all forms of sexual conduct, and microscopic descriptions of human genitalia contained on this recording are comedic art.

The *Nasty* recording is not comedy, but is first and foremost, music. Initially, it would appear very difficult to find a musical work obscene. As noted by the American Civil Liberties Union, the meaning of music is subjective and subject only to the limits of the listener’s imagination. *See* ACLU Brief at 3.

Music nevertheless is not exempt from a state’s obscenity statutes. Musical works are obscene if they meet the *Miller* test. Certainly it would be possible to

compose an obscene oratorio or opera and it has probably been done.

The plaintiffs claim that this case is novel since it seeks to determine whether music can be obscene. The particular work here, although belonging to the general category of music, however, is to be distinguished from a purely instrumental work, or other more common recordings with a fairly equal emphasis on music and lyrics. The focus of the *Nasty* recording is predominately on the lyrics. Expert testimony at trial indicates that a central characteristic of “rap” music is its emphasis on the *verbal* message. Rhythm is stressed over melody, not for its own sake, but to accentuate the words of the song. The pounding beat and the presence of near continuous lyrics support this conclusion. 2 Live Crew’s music is explicitly clear as to its message. Although music and lyrics must be considered jointly, it does not significantly alter the message of the *Nasty* recording to reduce it to a written transcription. The Supreme Court’s decision in *Kaplan v. California* is applicable here. The Court held that an expression by words alone, albeit in a written form, can be legally obscene even if there are no accompanying pictorial depictions. The case at bar is an extension of the law to the extent that words, as lyrics in music, can be obscene.

The key to judging the *Nasty* recording is to consider it as a whole. 2 Live Crew has “borrowed” components called “riffs” from other artists. Taking the work in its entirety, the several riffs do not lift *Nasty* to the level of a serious artistic work. Once the riffs are removed, all that remains is the rhythm and the explicit sexual lyrics which are utterly without any redeeming social value.

Obscenity is not a required element for socially valuable “rap” or “hip-hop” music. 2 Live Crew itself proved this point by the creation of its *Clean* recording.

The court is reminded of a story by Charles Baudelaire, a poet who also had problems with the civil authorities of his day. In *My Heart Laid Bare* (Vanguard Press 1951), at pages 203-04, he writes:

All the imbeciles of the Bourgeoisie who intentionally use the words, “immoral”, “immorality”, “morality in art” and other such stupid expressions remind me of Louise Villdieu, a five-franc whore who once went with me to the Louvre. She has never been there before, and began to blush and cover her face with her hands, repeatedly plucking at my sleeve and asking me, as we stood before deathless statutes and pictures, how such indecencies could be flaunted in public.

One of the plaintiffs’ expert witnesses testified at trial that material is art if it causes a reaction in the audience perceiving it. If that reaction is an appeal to the prurient interest in a patently offensive way, and if the material lacks serious

literary, artistic, political or scientific, the law does not call that art—it calls it obscenity and when so proven beyond a reasonable doubt is a crime in Florida.

### **Obscenity? Yes!**

The recording *As Nasty As They Wanna Be*, taken as a whole, is legally obscene.

The court so finds by a preponderance of the evidence although the standard of proof presents no real issue.

The court also finds *As Nasty As They Wanna Be* to be legally obscene under the *Miller* test by clear and convincing evidence, which standard the plaintiffs maintain is the correct burden of proof.

### **Prior Restraint And Procedural Due Process**

A prior restraint can be generally defined as any condition imposed by the government on the publication of speech. Such a limitation can come in varying forms including permit requirements, licensing taxes, registration, prepublication submission of materials, seizures, and judicial injunctions. The distinguishing characteristic of a prior restraint is that the condition vests power in a nonjudicial official to make the final decision as to whether speech will be permitted at all or in what form.

Prior restraints are repugnant to the right of free speech. The First Amendment prohibits this type of regulation to minimize the risk of governmental censorship. Many forms of speech are of value because of the urgency and immediacy of the idea expressed. Even if a censor ultimately allows publication, significant delay in the decisionmaking process can destroy the fleeting value of the speech. If speech is delayed or denied, the rights of both the speaker and his audience are impaired and society is the ultimate “loser.” Furthermore, if allowed, prior restraints necessarily legitimize the existence of a censor. The danger is that officials, even if originally well-intentioned, may be driven to suppress an ever growing amount of speech.

For all of these reasons, the First Amendment casts a jaundiced eye on any form of prior restraint. But, as with the right of free speech itself, this prohibition is not absolute. A limitation on speech prior to its publication may withstand constitutional scrutiny in “exceptional cases.” *Near v. Minnesota* (US 1931). Included within this category are all types of speech unprotected by the Constitution such as obscenity.

The fact that the government may prevent obscene materials from ever reaching their intended audience assumes that the issue of obscenity has already been decided. It is the courts and not nonjudicial officials who must decide whether a specific work is obscene. Interpreting obscenity laws requires “appraisal of facts, the exercise of judgment, and the formation of an opinion”; in other words, the exercise of judicial power.

Because of this presumption, the state must follow constitutionally mandated procedures in seizing obscene works. The state may criminalize obscenity, but its regulation must comport with the minimum procedural safeguards required by due process. To trigger the Fourteenth Amendment’s application, the state regulation must constitute a deprivation of a protected interest. Florida law provides that no property interest exists in obscene materials. In essence, this state has made obscenity a form of contraband, the seizure of which would not normally implicate the Fourteenth Amendment. However, because free speech has an independent source of protection under the First Amendment as a constitutional “liberty”, arguably obscene articles are not treated by the law like other contraband such as illegal drugs.

### **Ordered And Adjudged As Follows:**

1. The recording *As Nasty As They Wanna Be* created by the group 2 Live Crew is hereby DECLARED obscene.
2. The action of the Broward County Sheriff’s office in threatening retail music stores with arrest for selling the *Nasty* recording and presenting them with a copy of a probable cause order is hereby DECLARED unconstitutional as an improper prior restraint of free speech in violation of the First and Fourteenth Amendments to the United States Constitution.

### **On Appeal**

On appeal, the Eleventh Circuit Court of Appeals reversed the district court’s holding in *Skywalker Records*. See if you can guess why before perusing the opinion at [Luke Records v. Navarro](#).

### **Child Pornography**

In [New York v. Ferber](#) (US 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](#)
- [how cited at Google Scholar](#)
- [case at Westlaw](#).
- [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 (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](#) (US 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. 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](#) (US 1973). *Ferber* recognized that "the *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." [Ferber](#).



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*.

I Before 1996, Congress defined child pornography as the type of depictions at issue in *Ferber*, images made using actual minors. The CPPA retains that prohibition and adds three other prohibited categories of speech, of which the first, § 2256(8)(B), and the third, § 2256(8)(D), are at issue in this case. Section 2256(8)(B) prohibits:

“any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture,” that “is, or appears to be, of a minor engaging in sexually explicit conduct.”

The prohibition on “any visual depiction” does not depend at all on how the image is produced. The section captures a range of depictions, sometimes called “virtual child pornography,” which include computer-generated images, as well as images produced by more traditional means. For instance, the literal terms of the statute embrace a Renaissance painting depicting a scene from classical mythology, a “picture” that “appears to be, of a minor engaging in sexually explicit conduct.” The statute also prohibits Hollywood movies, filmed without any child actors, if a jury believes an actor “appears to be” a minor engaging in “actual or simulated ... sexual intercourse.”

These images do not involve, let alone harm, any children in the production process; but Congress decided the materials threaten children in other, less direct, ways. Pedophiles might use the materials to encourage children to participate in sexual activity. “A child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children ‘having fun’ participating in such activity.” ... Furthermore, pedophiles might “whet their own sexual appetites”

with the pornographic images, “thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children.” ... Under these rationales, harm flows from the content of the images, not from the means of their production.

In addition, Congress identified another problem created by computer-generated images: Their existence can make it harder to prosecute pornographers who do use real minors.... As imaging technology improves, Congress found, it becomes more difficult to prove that a particular picture was produced using actual children. To ensure that defendants possessing child pornography using real minors cannot evade prosecution, Congress extended the ban to virtual child pornography.

Section 2256(8)(C) prohibits a more common and lower tech means of creating virtual images, known as computer morphing. Rather than creating original images, pornographers can alter innocent pictures of real children so that the children appear to be engaged in sexual activity. Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber*. Respondents do not challenge this provision, and we do not consider it.

Respondents do challenge § 2256(8)(D). Like the text of the “appears to be” provision, the sweep of this provision is quite broad. Section 2256(8)(D) defines child pornography to include any sexually explicit image that was:

“advertised, promoted, presented, described, or distributed in such a manner that conveys the impression” it depicts “a minor engaging in sexually explicit conduct.”

One Committee Report identified the provision as directed at sexually explicit images pandered as child pornography. (“This provision prevents child pornographers and pedophiles from exploiting prurient interests in child sexuality and sexual activity through the production or distribution of pornographic material which is intentionally pandered as child pornography”). The statute is not so limited in its reach, however, as it punishes even those possessors who took no part in pandering. Once a work has been described as child pornography, the taint remains on the speech in the hands of subsequent possessors, making possession unlawful even though the content otherwise would not be objectionable.

Fearing that the CPPA threatened the activities of its members, respondent Free Speech Coalition and others challenged the statute in the United States District Court for the Northern District of California. The Coalition, a California trade association for the adult-entertainment industry, alleged that its members did not

use minors in their sexually explicit works, but they believed some of these materials might fall within the CPPA's expanded definition of child pornography. The other respondents are Bold Type, Inc., the publisher of a book advocating the nudist lifestyle; Jim Gingerich, a painter of nudes; and Ron Raffaelli, a photographer specializing in erotic images. Respondents alleged that the "appears to be" and "conveys the impression" provisions are overbroad and vague, chilling them from producing works protected by the First Amendment. The District Court disagreed and granted summary judgment to the Government. The court dismissed the overbreadth claim because it was "highly unlikely" that any "adaptations of sexual works like 'Romeo and Juliet,' . . . will be treated as 'criminal contraband.'"

The Court of Appeals for the Ninth Circuit [reversed](#). The court reasoned that the Government could not prohibit speech because of its tendency to persuade viewers to commit illegal acts. The court held the CPPA to be substantially overbroad because it bans materials that are neither obscene nor produced by the exploitation of real children as in [New York v. Ferber](#). Judge Ferguson dissented on the ground that virtual images, like obscenity and real child pornography, should be treated as a category of speech unprotected by the First Amendment. The Court of Appeals voted to deny the petition for rehearing en banc, over the dissent of three judges.

While the Ninth Circuit found the CPPA invalid on its face, four other Courts of Appeals have sustained it.

We granted certiorari. 531 U. S. 1124 (2001).

II The First Amendment commands, "Congress shall make no law . . . abridging the freedom of speech." The government may violate this mandate in many ways ... but a law imposing criminal penalties on protected speech is a stark example of speech suppression. The CPPA's penalties are indeed severe. A first offender may be imprisoned for 15 years. § 2252A(b)(1). A repeat offender faces a prison sentence of not less than 5 years and not more than 30 years in prison. *Ibid*. While even minor punishments can chill protected speech, see [Wooley v. Maynard](#) (US 1977), this case provides a textbook example of why we permit facial challenges to statutes that burden expression. With these severe penalties in force, few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law. The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere. Under this principle, the CPPA is unconstitutional on its face if it prohibits a substantial amount of protected expression. See [Broadrick v.](#)

*Oklahoma* (US 1973).

The sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people. In its legislative findings, Congress recognized that there are subcultures of persons who harbor illicit desires for children and commit criminal acts to gratify the impulses. ... See ... also U.S. Dept. of Health and Human Services, Administration on Children, Youth and Families, Child Maltreatment 1999 (estimating that 93,000 children were victims of sexual abuse in 1999). Congress also found that surrounding the serious offenders are those who flirt with these impulses and trade pictures and written accounts of sexual activity with young children.

Congress may pass valid laws to protect children from abuse, and it has. The prospect of crime, however, by itself does not justify laws suppressing protected speech. See *Kingsley Int'l Pictures Corp. v. Regents of Univ. of N. Y.* (US 1959) (“Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech” (internal quotation marks and citation omitted)). It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities. See *FCC v. Pacifica Foundation* (US 1978) (“The fact that society may find speech offensive is not a sufficient reason for suppressing it”); see also *Reno v. American Civil Liberties Union* (US 1997) (“In evaluating the free speech rights of adults, we have made it perfectly clear that ‘sexual expression which is indecent but not obscene is protected by the First Amendment’”) (quoting [*Sable Communications of Cal., Inc. v. FCC*] ([http://scholar.google.com/scholar\\_case?case=12959937071120946576](http://scholar.google.com/scholar_case?case=12959937071120946576)) (US 1989)); *Carey v. Population Services Int'l* (US 1977) (“The fact that protected speech may be offensive to some does not justify its suppression”).

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. See *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.* (US 1991) (Kennedy, J., concurring). 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](#). 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*, 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 engage 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*, (“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. 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 16-year-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. See [\*Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass.\*](#) (US 1966) (plurality opinion) ("The social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness"). 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. See [\*New York v. Ferber\*](#). 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. See also *id.*, at 775 (O'Connor, J., concurring) ("As drafted, New York's statute does not attempt to suppress the communication of particular ideas"). 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.

Later, in *Osborne v. Ohio*, (US 1990), the Court ruled that these same interests justified a ban on the possession of pornography produced by using children. "Given the importance of the State's interest in protecting the victims of child pornography," the State was justified in "attempting to stamp out this vice at all levels in the distribution chain." *Id.*, at 110. *Osborne* also noted the State's interest in preventing child pornography from being used as an aid in the solicitation of minors. *Id.*, at 111. The Court, however, anchored its holding in the concern for the participants, those whom it called the "victims of child pornography." *Id.*, at 110. It did not suggest that, absent this concern, other governmental interests would suffice. See *infra*, at 251-253.

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 ... 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: “If 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.

III The CPPA, for reasons we have explored, is inconsistent with *Miller* and finds no support in *Ferber*. The Government seeks to justify its prohibitions in other ways. It argues that the CPPA is necessary because pedophiles may use virtual child pornography to seduce children. There are many things innocent in themselves, however, such as cartoons, video games, and candy, that might be used for immoral purposes, yet we would not expect those to be prohibited because they can be misused. The Government, of course, may punish adults who provide unsuitable materials to children, see *Ginsberg v. New York* (US 1968), and it may enforce criminal penalties for unlawful solicitation. The precedents establish, however, that speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it. See *Sable Communications*. In *Butler v. Michigan* (US 1957), the Court invalidated a statute prohibiting distribution of an indecent publication because of its tendency to “‘incite minors to violent or depraved or immoral acts.’” A unanimous Court agreed upon the important First Amendment principle that the State could not “reduce the adult population . . . to reading only what is fit for children.” *Id.*, at 383. We have reaffirmed this holding. See *United States v. Playboy Entertainment Group, Inc.* (US 2000) (“The objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative”); *Reno v. American Civil Liberties Union* (The “governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults”); *Sable Communications* (striking down a ban on “dial-a-porn” messages that had “the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear”).

Here, the Government wants to keep speech from children not to protect them from its content but to protect them from those who would commit other crimes. The principle, however, remains the same: The Government cannot ban speech



fit for adults simply because it may fall into the hands of children. The evil in question depends upon the actor's unlawful conduct, conduct defined as criminal quite apart from any link to the speech in question. This establishes that the speech ban is not narrowly drawn. The objective is to prohibit illegal conduct, but this restriction goes well beyond that interest by restricting the speech available to law-abiding adults.

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." *Stanley v. Georgia* (US 1969). 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. See *Kingsley Int'l Pictures Corp.*; see also *Bartnicki v. Vopper*, (US 2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it"). The government may not prohibit speech because it increases the chance an unlawful act will be committed "at some indefinite future time." *Hess v. Indiana* (US 1973) (*per curiam*). The government may suppress speech for advocating the use of force or a violation of law only if "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio* (US 1969). There is here no attempt, incitement, solicitation, or conspiracy. The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct.

The Government next argues that its objective of eliminating the market for pornography produced using real children necessitates a prohibition on virtual images as well. Virtual images, the Government contends, are indistinguishable from real ones; they are part of the same market and are often exchanged. In this way, it is said, virtual images promote the trafficking in works produced through the exploitation of real children. The hypothesis is somewhat implausible. If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few

pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice.

In the case of the material covered by *Ferber*, the creation of the speech is itself the crime of child abuse; the prohibition deters the crime by removing the profit motive. See *Osborne*. Even where there is an underlying crime, however, the Court has not allowed the suppression of speech in all cases. *E. g.*, *Bartnicki, supra*, at 529 (market deterrence would not justify law prohibiting a radio commentator from distributing speech that had been unlawfully intercepted). We need not consider where to strike the balance in this case, because here, there is no underlying crime at all. Even if the Government's market deterrence theory were persuasive in some contexts, it would not justify this statute.

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 ..." *Broadrick v. Oklahoma*. The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.

To avoid the force of this objection, the Government would have us read the CPPA not as a measure suppressing speech but as a law shifting the burden to the accused to prove the speech is lawful. In this connection, the Government relies on an affirmative defense under the statute, which allows a defendant to avoid conviction for nonpossession offenses by showing that the materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children. See 18 U. S. C. § 2252A(c).

The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful. An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative

defense. In cases under the CPPA, the evidentiary burden is not trivial. Where the defendant is not the producer of the work, he may have no way of establishing the identity, or even the existence, of the actors. If the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor. The statute, moreover, applies to work created before 1996, and the producers themselves may not have preserved the records necessary to meet the burden of proof. Failure to establish the defense can lead to a felony conviction.

We need not decide, however, whether the Government could impose this burden on a speaker. Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is incomplete and insufficient, even on its own terms. It allows persons to be convicted in some instances where they can prove children were not exploited in the production. A defendant charged with possessing, as opposed to distributing, proscribed works may not defend on the ground that the film depicts only adult actors. See *ibid.* So while the affirmative defense may protect a movie producer from prosecution for the act of distribution, that same producer, and all other persons in the subsequent distribution chain, could be liable for possessing the prohibited work.

Furthermore, the affirmative defense provides no protection to persons who produce speech by using computer imaging, or through other means that do not involve the use of adult actors who appear to be minors. See *ibid.* In these cases, the defendant can demonstrate no children were harmed in producing the images, yet the affirmative defense would not bar the prosecution. For this reason, the affirmative defense cannot save the statute, for it leaves unprotected a substantial amount of speech not tied to the Government's interest in distinguishing images produced using real children from virtual ones.

In sum, § 2256(8)(B) 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.*

**Justice Thomas, concurring in the judgment.**

In my view, the Government's most persuasive asserted interest in support of the Child Pornography Prevention Act of 1996 (CPPA) is the prosecution rationale—that persons who possess and disseminate pornographic images of real children may escape conviction by claiming that the images are computer generated, thereby raising a reasonable doubt as to their guilt. At this time, however, the Government asserts only that defendants *raise* such defenses, not that they have done so successfully. In fact, the Government points to no case in which a defendant has been acquitted based on a “computer-generated images” defense. While this speculative interest cannot support the broad reach of the CPPA, technology may evolve to the point where it becomes impossible to enforce actual child pornography laws because the Government cannot prove that certain pornographic images are of real children. In the event this occurs, the Government should not be foreclosed from enacting a regulation of virtual child pornography that contains an appropriate affirmative defense or some other narrowly drawn restriction.

The Court suggests that the Government's interest in enforcing prohibitions against real child pornography cannot justify prohibitions on virtual child pornography, because “this analysis turns the First Amendment upside down. The Government may not suppress lawful speech as the means to suppress unlawful speech.” But if technological advances thwart prosecution of “unlawful speech,” the Government may well have a compelling interest in barring or otherwise regulating some narrow category of “lawful speech” in order to enforce effectively laws against pornography made through the abuse of real children. The Court does leave open the possibility that a more complete affirmative defense could save a statute's constitutionality, implicitly accepting that some regulation of virtual child pornography might be constitutional. I would not prejudge, however, whether a more complete affirmative defense is the only way to narrowly tailor a criminal statute that prohibits the possession and dissemination of virtual child pornography. Thus, I concur in the judgment of the Court.

[Justice O'Connor's dissent omitted]

**Chief Justice Rehnquist, dissenting**

with whom Justice Scalia joins in part

We normally do not strike down a statute on First Amendment grounds “when a limiting construction has been or could be placed on the challenged statute.”

*Parker v. Levy* (US 1974) (“This Court has ... repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied”). This case should be treated no differently.

Other than computer-generated images that are virtually indistinguishable from real children engaged in sexually explicit conduct, the CPPA can be limited so as not to reach any material that was not already unprotected before the CPPA. The CPPA’s definition of “sexually explicit conduct” is quite explicit in this regard. It makes clear that the statute only reaches “visual depictions” of:

“Actual or simulated . . . sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; . . . bestiality; . . . masturbation; . . . sadistic or masochistic abuse; or . . . lascivious exhibition of the genitals or pubic area of any person.” 18 U. S. C. § 2256(2).

The Court and Justice O’Connor suggest that this very graphic definition reaches the depiction of youthful looking adult actors engaged in suggestive sexual activity, presumably because the definition extends to “simulated” intercourse. *Ante*, at 247-248 (majority opinion); *ante*, at 263 (opinion concurring in judgment in part and dissenting in part). Read as a whole, however, I think the definition reaches only the sort of “hard core of child pornography” that we found without protection in *Ferber*. So construed, the CPPA bans visual depictions of youthful looking adult actors engaged in *actual* sexual activity; mere *suggestions* of sexual activity, such as youthful looking adult actors squirming under a blanket, are more akin to written descriptions than visual depictions, and thus fall outside the purview of the statute . . . .

Indeed, we should be loath to construe a statute as banning film portrayals of Shakespearian tragedies, without some indication—from text or legislative history—that such a result was intended. In fact, Congress explicitly instructed that such a reading of the CPPA would be wholly unwarranted. As the Court of Appeals for the First Circuit has observed:

“The legislative record, which makes plain that the [CPPA] was intended to target only a narrow class of images—visual depictions ‘which are virtually indistinguishable to unsuspecting viewers from unretouched photographs of actual children engaging in identical sexual conduct.’” *United States v. Hilton* (1999) (quoting S. Rep. No. 104-358, pt. I, p. 7 (1996)).

This narrow reading of “sexually explicit conduct” not only accords with the text of the CPPA and the intentions of Congress; it is exactly how the phrase was

understood prior to the broadening gloss the Court gives it today. Indeed, had “sexually explicit conduct” been thought to reach the sort of material the Court says it does, then films such as *Traffic* and *American Beauty* would not have been made the way they were. *Ante*, (discussing these films’ portrayals of youthful looking adult actors engaged in sexually suggestive conduct). *Traffic* won its Academy Award in 2001. *American Beauty* won its Academy Award in 2000. But the CPPA has been on the books, and has been enforced, since 1996. The chill felt by the Court, (“[F]ew legitimate movie producers . . . would risk distributing images in or near the uncertain reach of this law”), has apparently never been felt by those who actually make movies.

To the extent the CPPA prohibits possession or distribution of materials that “convey the impression” of a child engaged in sexually explicit conduct, that prohibition can and should be limited to reach “the sordid business of pandering” which lies outside the bounds of First Amendment protection. *Ginzburg v. United States* (US 1966) (conduct that “deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed,” may lose First Amendment protection); *United States v. Playboy Entertainment Group, Inc.* (Scalia, J., dissenting) (US 2000) (collecting cases). This is how the Government asks us to construe the statute ... and it is the most plausible reading of the text, which prohibits only materials “*advertised, promoted, presented, described, or distributed in such a manner* that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.” 18 U. S. C. § 2256(8)(D) (emphasis added).

The First Amendment may protect the video shopowner or film distributor who promotes material as “entertaining” or “acclaimed” regardless of whether the material contains depictions of youthful looking adult actors engaged in nonobscene but sexually suggestive conduct. The First Amendment does not, however, protect the panderer. Thus, materials promoted as conveying the impression that they depict actual minors engaged in sexually explicit conduct do not escape regulation merely because they might warrant First Amendment protection if promoted in a different manner. See *Ginzburg, supra*, at 474-476; cf. *Jacobellis v. Ohio* (US 1964) (Warren, C. J., dissenting) (“In my opinion, the use to which various materials are put—not just the words and pictures themselves—must be considered in determining whether or not the materials are obscene”). I would construe “conveys the impression” as limited to the panderer, which makes the statute entirely consistent with *Ginzburg* and other cases.

In sum, while potentially impermissible applications of the CPPA may exist, I doubt that they would be “substantial ... in relation to the statute’s plainly legitimate sweep.” *Broadrick* 413 U. S., at 615 The aim of ensuring the enforceability of our Nation’s child pornography laws is a compelling one. The

CPPA is targeted to this aim by extending the definition of child pornography to reach computer generated images that are virtually indistinguishable from real children engaged in sexually explicit conduct. The statute need not be read to do any more than precisely this, which is not offensive to the First Amendment.

For these reasons, I would construe the CPPA in a manner consistent with the First Amendment, reverse the Court of Appeals' judgment, and uphold the statute in its entirety.

**USDOJ on Child Pornography** Please read this:

- [USDOJ Citizens Guide To U.S. Federal Law On Child Pornography.](#)