

A state initiated a criminal prosecution against the owner of a video store for selling a video that consisted entirely of pictures of nude sunbathers on a beach in a foreign country where nude public sunbathing is common. The state charged that selling the video violated its anti-obscenity law. The store owner defended on the ground that the prosecution violated his constitutional right to freedom of speech.

Should the store owner prevail in this defense?

- A. No, because the store owner is engaged in the commercial sale of the video, which is not protected by the First and Fourteenth Amendments.
- B. No, because the video consists entirely of portrayals of nudity, appeals to the prurient interest of viewers, and lacks serious social value as a whole.
- C. Yes, because mere portrayals of nudity are insufficient to justify a finding that the video is obscene as a matter of constitutional law.
- D. Yes, because the portrayals of nudity occurred outside the United States, and therefore the state lacks a compelling interest in applying its anti-obscenity law to the sale of the video.

Explanation:

Unprotected speech

- Fighting words/threats
- Inciting crime
- Defamation
- Obscenity

Mnemonic: **FIDO**

The First Amendment **free speech clause** generally prohibits the government from regulating speech based on its content (ie, what is being said). Such content-based regulations are usually subject to strict scrutiny. But certain categories of speech—like **obscenity**—are **not protected** and can be freely regulated by the government. Under the **Millertest**, speech is considered obscene when it:

- appeals to the prurient interest (ie, a shameful or morbid interest in sexual matters)
- depicts sexual conduct in a patently offensive way *and*
- lacks serious literary, artistic, political, or scientific value.

The first two elements of this test are evaluated under contemporary community standards, while the third element is evaluated under a national standard. But **mere portrayals of nudity**—as seen in the store owner's video—are **never obscene (Choice B)**. As a result, this content-based restriction is invalid unless it survives strict scrutiny. This requires the state to prove that the restriction is necessary to achieve a compelling state interest. And since this is a nearly impossible task, the store owner should prevail.

(Choice A) The government can freely regulate the production, sale, and distribution of obscene materials. But since the video is not obscene, commercial sale of the video is protected by the First Amendment (as applied to the states through the Fourteenth Amendment).

(Choice D) The location of the video itself is relevant since it affects whether the state has jurisdiction to prosecute the store owner. But where the nudity in that video occurred is irrelevant and does not affect the state's interest in applying the anti-obscenity law.

Educational objective:

Obscenity is not protected by the free speech clause. And under the three-part *Miller* test for evaluating obscenity, mere portrayals of nudity are never obscene.

References

- *Miller v. California*, 413 U.S. 15, 24 (1973) (setting forth the three-prong obscenity test).

- *Erznoznik v. Jacksonville*, 422 U.S. 205, 213–14 (1975) (holding that mere nudity is not obscene).

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