Constitutionality of Sexually Oriented Speech: Obscenity, Indecency, and Child Pornography

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Introduction

Sexual speech has been singled out as a form of speech that does not receive complete constitutional protection under federal law.[1] How a particular court classifies sexual speech largely determines the level of protection accorded to the

1. *See* Roth v. United States, 354 U.S. 476, 485–86 (1957) (finding the law regulating obscene, lewd, lascivious, and filthy material was permissible because the history of the First Amendment implicitly excluded obscene speech from Constitutional protection).

speech. This article addresses three primary classifications of sexual speech: obscenity, indecency, and child pornography.

Part I of this article elucidates the relationship between the First Amendment and sexual speech, including obscene speech and indecency. Part II explores the extent to which obscene and indecent speech may be regulated and criminalized, in public and commercial arenas as well as in private possession, and discusses enforcement by the Obama administration. Part III examines special regulations pertaining to child pornography.

I. THE FIRST AMENDMENT AND SEXUAL SPEECH

The First Amendment to the United States Constitution guarantees that "Congress shall make *no* law . . . abridging the freedom of speech."[2] However, there is not absolute protection for all speech.[3] In *Roth v. United States*, the Supreme Court determined that "obscenity is not protected by the freedoms of speech and press."[4] *Roth* is a foundational case regarding obscenity laws and first amendment speech, although the Oregon Supreme Court, in *State v. Henry*, departed from *Roth* by granting obscene language speech protection on state constitutional grounds.[5] Under the cases that follow from *Roth*, certain types of speech are afforded more protection than others; generally, political speech is the most favored and sexual speech is the least favored.[6] The First Amendment does not protect obscene speech.[7] On the other hand, the First Amendment does offer some protection to indecent speech.[8]

Since the government must remain "neutral in the marketplace of ideas,"[9] regulation of speech based on its content is subject to strict scrutiny.[10] Content-neutral regulation that nevertheless impacts speech is subject to a lesser level of scrutiny. The Supreme Court explained this distinction in *Turner Broadcasting System, Inc. v. F.C.C.*:

> [Courts] apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny. In contrast, regulations that are unrelated to the content of speech are

2. U.S. CONST. amend. I (emphasis added).

3. Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) ("[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances.").

4. *Roth*, 354 U.S. at 481.

5. *Id.*; State v. Henry, 732 P.2d 9, 17 (Or. 1987) ("We hold that characterizing expression as "obscenity" under any definition, be it *Roth*, *Miller*, or otherwise, does not deprive it of protection under the Oregon Constitution.")

6. *See* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 422 (1992).

7. *See, e.g.*, Miller v. California, 413 U.S. 15, 36–37 (1973).

8. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 746–48 (1978).

9. *Id.* at 745–46.

10. Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994).

> subject to an *intermediate* level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.[11]

The strict scrutiny standard applied to content-based regulations[12] requires that the law be "narrowly tailored to promote a compelling government interest."[13] Legislatures enacting content-based restrictions must use the least restrictive means available to satisfy their goals.[14] Regulations not intended to restrict a particular message or viewpoint must only pass an intermediate level of review.[15] These content-neutral regulations must serve an important government interest, must be narrowly tailored to serve that interest, and must leave open alternative avenues of communication.[16]

A. UNPROTECTED SPEECH: OBSCENITY

Obscenity is defined by Black's Law Dictionary as "[t]he characteristic or state of being morally abhorrent or socially taboo, esp. as a result of referring to or depicting sexual or excretory functions."[17] The Supreme Court has declined to grant obscene speech First Amendment protection because the Court does not believe that the founding fathers intended to protect obscene speech.[18] Also, the Court has concluded that restrictions on obscenity do not undermine the political freedom central to First Amendment protections because "'repression' of political liberty [does not lurk] in every state regulation of the commercial exploitation of sex."[19] However, in determining what constitutes obscene speech,[20] courts must be mindful of First Amendment considerations.[21]

In *Miller v. California* the Supreme Court created a standard for distinguishing obscenity and indecency.[22] The decision requires a three-part inquiry as to:

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11. *Id*. at 642 (emphasis added).
12. *See* United States v. Playboy Ent. Group, Inc., 529 U.S. 803, 813 (2000) (holding that content-based restrictions on indecent speech incur a strict scrutiny review).
13. Perry Educ. v. Perry Local, 460 U.S. 37, 45 (1983).
14. Ashcroft v. ACLU, 542 U.S. 656, 665 (2004).
15. *Turner*, 512 U.S. at 642 ("[R]egulations that are unrelated to the content of speech are subject to an *intermediate* level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.") (emphasis added).
16. *Perry*, 460 U.S. at 45.
17. *Obscenity*, BLACK'S LAW DICTIONARY (4th pocket ed. 2011).
18. *Roth*, 354 U.S. at 483. According to the Court in *Roth*:

> [The unconditional phrasing of the First Amendment] did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech . . . . At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press. *Id*.

19. Miller v. California, 413 U.S. 15, 36 (1973).
20. *See* discussion *infra* Section III.
21. *See Miller*, 413 U.S. at 36; *see also* Stanley v. Georgia, 394 U.S. 557, 568 (1969).
22. *Miller*, 413 U.S. at 24, 28.

(1) Whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
(2) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
(3) Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[23]

1. Community Standards

Analysis of obscenity under the *Miller* test looks to local, as opposed to national, community standards.[24] The "community standards" test seeks to ensure that jurors assess the potentially obscene material from the point of view of an average person, not the most sensitive member of the community.[25] The court[26] or the jury can define the relevant community.[27] The community can include a state as large as California[28] or a small, rural community in Georgia.[29] Thus, First Amendment protection might be afforded in New York to materials deemed obscene, and therefore prohibited, in Maine.[30]

Despite the apparent repudiation of a national standards test in *Miller*, the Supreme Court has allowed courts to apply both national and local standards of decency.[31] In *Hamling v. United States*, the Court stated that the purpose of the community standards test was "to assure that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group."[32] Referencing national standards as well as community standards fulfilled this goal. Further, when instructing jurors on the community standards test, courts are not required to define which community jurors

23. *Id.*

24. *Id.* at 30 (finding that determinations of "what appeals to the 'prurient interest' or is 'patently offensive' . . . are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists").

25. *Id.* ("[T]he primary concern . . . is to be certain that . . . [material] will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one.").

26. *See, e.g.*, *Miller,* 413 U.S. at 30–31 ("The jury . . . was explicitly instructed . . . to apply 'contemporary community standards of the State of California.'").

27. Hamling v. United States, 418 U.S. 87, 105 (1974) (noting that *Miller* and its progeny "permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case.").

28. *See Miller*, 413 U.S. at 30–31.

29. *See, e.g.*, Jenkins v. Georgia, 418 U.S. 153, 157 (1974) (finding a statewide community is not necessary and that jurors may draw from "understanding of the community from which they came").

30. Nitke v. Ashcroft, 253 F. Supp. 2d 587, 602 (S.D.N.Y. 2003) ("[A] pornographer may have a First Amendment right to distribute her materials to New York, where they are not considered obscene, but be subject to prosecution for the same materials in Maine.").

31. *Hamling*, 418 U.S. at 107.

32. *Id.*

should consider.[33] Both parties may choose to use expert witnesses to help explain what the community standard should be; however, that determination is ultimately left up to the jurors.[34]

The interaction between obscene speech and the internet also creates problems in determining community standards because when obscenity is posted to the internet, it cannot be prevented from entering *any* community.[35] Accordingly, in *United States v. Thomas*, the Sixth Circuit has applied the standard of the local community in which the materials are received rather than a national community standard.[36] In effect, this means if distributors of sexual material wish to receive First Amendment protection, they must comply with the community standards where the materials are disseminated.[37] However, in 2002, the Ninth Circuit interpreted the plurality in *Ashcroft v. American Civil Liberties Union* for a clearer way in how to define community standards.[38] In *United States v. Kilbride*, the court followed the position of the Justices who concurred in the judgment on the narrowest grounds.[39] The court concluded that Justice O'Connor's and Justice Breyer's concurrences in the judgment were the correct standards to follow[40] and that a national community standard must be used to determine obscene material on the internet.[41] Justice O'Connor reasoned that "given Internet speakers' inability to control the geographic location of their audience, expecting them to bear the burden of controlling the recipients of their speech, as the court did in *Hamling* and *Sable*, may be entirely too much to ask, and would potentially suppress an inordinate amount of expression" and that a national community standard would avoid this First Amendment problem.[42] Justice Breyer reasoned that a local community standard would "provide the most puritan of communities with a heckler's Internet veto affecting the rest of the Nation."[43]

2. Prurient Interest

Before *Miller*, the Supreme Court defined "prurient" as "material having a tendency to excite lustful thoughts;" the Court in *Roth* also cited Webster's New International Dictionary definition of prurient: "itching; longing; uneasy with

33. *Jenkins*, 418 U.S. at 157.

34. *See Hamling*, 418 U.S. at 108–110.

35. Reno v. ACLU, 521 U.S. 844, 853 (1997) (noting that once a provider posts its content on the internet, it cannot prevent that content from entering any community); *see also infra* Section III.B.4.

36. United States v. Thomas, 74 F.3d. 701, 711 (6th Cir. 1996).

37. *See, e.g.*, Sable Commc'ns Inc. v. FCC, 492 U.S. 115, 125-26 (1989) ("There is no constitutional barrier under *Miller* to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others.").

38. *See generally* United States v. Kilbride, 584 F.3d 1240, 1252 (9th Cir. 2009) (discussing Ashcroft v. ACLU, 535 U.S. 564 (2002), where a fractured plurality had opposing views on a national community standard).

39. *Kilbride*, 584 F.3d at 1253-54.

40. *Id.* at 1254.

41. *Id.*

42. *Id.* at 1253 (quoting *Ashcroft*, 535 U.S. at 587).

43. *Id.* (quoting *Ashcroft*, 535 U.S. at 590).

desire or longing" and "puriency" as "lascivious desire or thought."[44] Prurient interest, as used in the *Miller* test, is understood as "that which appeals to a shameful or morbid interest in sex."[45] Triers of fact need not be aroused by material to judge it prurient. Instead, they merely need to determine whether the material in question would appeal to a member of the target group in a prurient manner and intends to arouse members of the target group.[46] Triers of fact have recognized that not all nudity appeals to a prurient interest; different lifestyles, such as that of a nudist, sometimes encompass materials that do not necessarily appeal to a prurient interest.[47]

3. Patently Offensive

The *Miller* court did not require states to define "patently offensive" in a uniform way.[48] The California statute at issue in *Miller* reads:

> Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, produces, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is for a first offense, guilty of a misdemeanor. If the person has previously been convicted of any violation of this section, the court may, in addition to the punishment authorized in Section 311.9, impose a fine not exceeding fifty thousand dollars ($50,000).[49]

The court cited the California statute defining obscenity, which states that a "purient interest" is one that "goes substantially beyond customary limits of candor in description or representation [of nudity, sex, or excretion]."[50] The *Miller* Court explained that "patently offensive," for example, could include "representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated . . . [or] masturbation, excretory functions, [and] a lewd exhibition of the genitals."[51] Some states, such as Minnesota and Illinois, have included sexual acts not mentioned in *Miller*, such as bestiality, sadomasochism, and sexual

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44. Roth v. United States, 354 U.S. 476, 487 n.20 (1957).

45. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985).

46. *See, e.g.*, United States v. Guglielmi, 819 F.2d 451 (4th Cir. 1987), *vacated on other grounds*, 929 F.2d 1001 (4th Cir. 1991); United States v. Petrov, 747 F.2d 824 (2d. Cir. 1984) (finding that although defendants in both cases agreed that the average person would not find humans having intercourse with animals arousing, this does not preclude a finding that some people could be aroused by it and that it could be obscene).

47. *See, e.g.*, United States v. Various Articles of Merch., 230 F.3d 649, 654 (3d Cir. 2000) (noting that nudist magazines depicting naked children did not necessarily appeal to prurient interests).

48. Miller v. California, 413 U.S. 15, 30 (1973).

49. *See* CAL. PENAL CODE § 311.2 (West).

50. *Miller*, 413 U.S. at 16 (citing CAL. PENAL CODE § 311(a)).

51. *Id.* at 25.

bondage.[52] These additions have been found to be permissible examples of "patently offensive" behavior that states may restrict or ban as obscene.[53]

4. Societal Value

Sexually explicit materials that have "serious literary, artistic, political, or scientific value" when viewed as a whole receive full First Amendment protection under *Miller*, which affords some protection to sexual materials with societal value.[54] Context is important in this determination. For example, "medical books for the education of physicians and related personnel" with explicit illustrations and descriptions are protected.[55] Also, video games with fleeting nudity can be protected.[56] In *Entertainment Software Association v. Blagojevich*, the court held that the video game *God of War* was essentially an interactive version of Homer's *Odyssey,* and its fleeting nudity in one scene should be protected because the game as a whole has literary value for the youths who play it.[57] In contrast, merely putting a quotation from a famous author in the flyleaf of a book does not render it a work of serious literature such that it will merit full First Amendment protection.[58]

B. SEMI-PROTECTED SPEECH: INDECENCY

Indecent speech is protected by the First Amendment but is disfavored[59] and may be regulated.[60] Indecent speech, though not defined by the Supreme Court, has been explained by the Federal Communications Commission (FCC) as that which "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards . . . sexual or excretory organs or activities."[61] The FCC further describes indecent content as that which "is patently offensive but does not meet the three-prong test for obscenity."[62] The FCC uses a

52. *See, e.g.*, MINN. STAT. ANN. § 617.241(1)(b)(i)-(iv) (West, Westlaw through 2014 Reg. Sess.) (including "sadomasochistic abuse" in definition of obscene materials); 720 ILL. COMPILED STAT. ANN. § 5/11-20 (b)(2) (West, Westlaw through P.A. 98-1132 2014 Reg. Sess.); *see also* S.C. CODE ANN. § 16-15-305(C)(1)(c); OHIO REV. CODE ANN. § 2907.01(E) (West).

53. *See* Ward v. Illinois, 431 U.S. 767, 773 (1977) (noting that while not specified in *Miller* as proscribable conduct, sadomasochism may be banned).

54. *Miller*, 413 U.S. at 34.

55. *Id.* at 26.

56. Ent. Software Ass'n v. Blagojevich, 469 F.3d 641, 650 (7th Cir. 2006).

57. *Id.*

58. Kois v. Wisconsin, 408 U.S. 229, 231 (1972) ("A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication.").

59. *See* Young v. Am. Mini Theatres Inc., 427 U.S. 50, 70–71 (1976) (finding sexually related material that is not obscene is protected by the First Amendment, but less so than other forms of speech, such as political debate).

60. FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978) (holding that the Federal Communications Commission's ban on indecent broadcasts is constitutional).

61. *The Public and Broadcasting*, FCC, https://www.fcc.gov/media/radio/public-and-broadcasting#OBSCENE (last visited Mar. 13, 2022) [hereinafter *The Public and Broadcasting*].

62. *See Obscene, Indecent and Profane Broadcasts*, FCC, https://www.fcc.gov/consumers/guides/obscene-indecent-and-profane-broadcasts (last visited Mar. 5, 2022).

contextual balancing test to assess whether material is patently offensive. Three factors are significant in this contextual assessment: "(1) the explicitness or graphic nature of the description or depiction; (2) whether the material dwells on or repeats at length descriptions or depictions of sexual or excretory organs or activities; and (3) whether the material panders to, titillates, or shocks the audience."[63] Unlike obscene speech, indecent speech need not appeal to the prurient interest or lack serious literary, artistic, political, or scientific value in order to be regulated.[64]

The First Amendment protects sexual speech not rising to the level of obscenity but provides less protection than it does for more valuable forms of speech, such as political expression.[65] The Supreme Court has explained that:

> [E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials . . . society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . . Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.[66]

Generally, when the government regulates speech on the basis of its indecent content, courts must apply strict scrutiny.[67] However, courts apply a lower level of scrutiny to even questionable content-based regulations of indecent speech when the government is trying to limit harmful secondary effects of the speech[68] unrelated to its meaning or content.[69] Courts have determined that if the government's predominant intent is to combat the consequences, or "secondary effects" of adult entertainment, such as increased crime or declining property values, content-neutral intermediate scrutiny is used to evaluate the constitutionality of the

63. WDBJ Television, Inc., 30 FCC Rcd. 3024, 3027 (2015) (citing Indus. Guidance on the Comm'n's Case L., 16 FCC Rcd. 7999, 8003 (2001) (interpreting 18 U.S.C. § 1464 and Enf't Policies Regarding Broad Indecency)).

64. *Id.*

65. *Young*, 427 U.S. at 70 (plurality opinion).

66. *Id.*

67. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641–42 (1994). To withstand strict scrutiny, the government must demonstrate that the regulation is: (1) necessary to serve a compelling governmental interest, and (2) narrowly drawn to achieve that interest. Widmar v. Vincent, 454 U.S. 263, 270 (1981). The regulation will fail judicial scrutiny if there is a less-restrictive alternative that "would be at least as effective in achieving the legitimate purpose that the [regulation] was enacted to serve." Reno v. ACLU, 521 U.S. 844, 874–75 (1997).

68. City of Erie v. Pap's A.M., 529 U.S. 277, 289–303 (2000) (plurality opinion).

69. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46–48 (1986) (zoning ordinance that restricted the location of adult bookstores and theaters was permissible because its purpose was to "prevent crime, protect the city's retail trade, maintain property values, and generally [protect] . . . the quality of urban life," not to suppress meaning or expression).

regulation.[70] Justice Kennedy explained the implications of the secondary effects test:

> [W]hile the material inside adult bookstores and movie theaters is speech, the consequent sordidness outside is not. The challenge is to correct the latter while leaving the former, as far as possible, untouched. If a city can decrease the crime and blight associated with certain speech by the traditional exercise of its zoning power, and at the same time leave the quantity and accessibility of the speech substantially undiminished, there is no First Amendment objection. This is so even if the measure identifies the problem outside by reference to the speech inside—that is, even if the measure is in that sense content-based.[71]

Some circuits even require evidence that secondary effects existed prior to a regulation's enactment.[72]

Once a court has determined that the government is addressing the secondary effects of speech, it applies one of two tests: the time, place, and manner restrictions test, or the *O'Brien* test. The first test is used when the conduct at issue is speech.[73] Under this test, the regulation will stand if: (1) it is content-neutral, (2) it is narrowly tailored to serve a significant governmental interest, and (3) it leaves open reasonable alternative channels for communication of the information.[74] When speech and non-speech elements are combined, as in the burning of draft cards or in nude dancing, the *O'Brien* test is applied.[75] To survive review under the *O'Brien* test content-neutral regulations of expressive conduct must: (1) be derived from a constitutional power of the government, (2) further an important or substantial governmental interest, (3) further an interest that is unrelated to the suppression of free expression, and (4) restrict speech only as far as is needed to further the interest.[76]

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70. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 567–71 (1991) (holding a zoning ordinance requiring nude dancers to wear pasties and G-strings constitutional because it targeted the secondary effects of nude dancing); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 70–71 (1976) (holding that combating the legitimate secondary effects of adult theaters makes the government's zoning ordinance imposing restrictions on the theaters constitutional). *But see* Erznoznik v. City of Jacksonville, 422 U.S. 205, 209–15 (1975) (holding that the ordinance prohibiting drive-in movie theaters to exhibit motion pictures containing nudity is unconstitutional because the government's alleged interests, protecting children and the public at large, and traffic control, are not sufficient secondary effects).

71. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 445 (2002) (Kennedy, J., concurring).

72. White River Amusement Pub, Inc. v. Town of Hartford, 481 F.3d 163, 171 (2d Cir. 2007) (citing various circuit cases that enforce the pre-enactment evidence standard).

73. *See Alameda Books*, 535 U.S. at 434–43 (applying time, place, and manner restrictions test).

74. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293–94 (1984).

75. *See* United States v. O'Brien, 391 U.S. 367, 376–77 (1968); *see also* City of Erie v. Pap's A.M., 529 U.S. 277, 290–303 (2000) (applying the *O'Brien* test).

76. *O'Brien*, 391 U.S. at 377 (holding that burning a draft card combines speech and non-speech elements and can be regulated because the government's regulation passes the four-part test); *see also*

II. REGULATING SEXUAL SPEECH

Sexual speech is similarly disfavored.[77] As such, both content-specific and content-neutral regulations of indecent speech can pass constitutional muster, including those relating to zoning and licensing of adult businesses or nude dancing, and regulation of the media.

A. REGULATING ADULT BUSINESSES

Cities can constitutionally regulate sex-related businesses, such as adult arcades, bookstores, cabarets, motels, theaters, and massage parlors.[78] Nude dancing and other sexually-related conduct that occurs in adult businesses is generally labeled "expressive conduct" and is afforded a modicum of First Amendment protection.[79]

1. Zoning and Licensing

The Supreme Court permits city governments to regulate the location of adult businesses under the secondary effects doctrine.[80] Under this doctrine, zoning ordinances targeting adult-businesses may be constitutional when implemented to tackle the secondary effects of such businesses.[81] In *Young v. American Mini Theatres*, the Supreme Court upheld a Detroit ordinance requiring geographic disbursement of adult businesses, reasoning that states may sometimes discriminate on the basis of content if doing so serves a legitimate governmental purpose.[82] The ordinance was thus found to be a constitutional use of the State's zoning power because it sought to preserve the character of Detroit neighborhoods.[83] This position was advanced in *Renton v. Playtime Theatres,* a 7–2 decision in which the Court upheld a zoning ordinance that restricted the location

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Barnes v. Glen Theatre, Inc., 501 U.S. 560, 567–71 (extending the *O'Brien* test to the expressive conduct of adult dancers).

77. *See, e.g.*, Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 61 (1976) (finding that the expression of sexual material in adult bookstores and theaters is of a lesser value than other types of speech, such as political debates).

78. *See, e.g.*, Alameda Books, 535 U.S. at 430 (plurality) (holding that Los Angeles Municipal Code section 12.70(C) "prohibiting the establishment, substantial enlargement, or transfer of ownership of an adult arcade, bookstore, cabaret, motel, theater, or massage parlor or a place for sexual encounters within 1,000 feet of another such enterprise or within 500 feet of any religious institution, school, or public park" was constitutional).

79. *See* Pap's A.M., 529 U.S. at 289 (holding that nude dancing includes the conveyance of an erotic message by the dancer, therefore falling "within the outer ambit of the First Amendment's protection"). However, the Court does not unanimously believe that adult businesses are protected by the First Amendment. *See* City of Littleton v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774, 787 (2004) (Scalia, J. concurring) (noting that sex pandering is not protected under the Nation's long understanding of the First Amendment).

80. *See Young*, 427 U.S. at 70–71 (finding sexually related material that is not obscene is protected by the First Amendment, but less so than other forms of speech, such as political debate).

81. *Id.*

82. *Id.*

83. *Id.* at 71.

options for adult theaters.[84] Writing for the Court, Justice Rehnquist argued that the ordinance was not content-based because it was unrelated to the content of the films, but rather was based on tackling crime and diminishing property values caused by adult-theaters.[85]

In practice, the secondary effects doctrine tends to grant the government a fair amount of leeway in regulating adult businesses. This is because the State may rely on evidence that it reasonably believes to be relevant, even if the evidence does not adequately prove that the ordinance serves the State's interest.[86] For example, in *City of Los Angeles v. Alameda Books*, the Court upheld a zoning law limiting concentration of adult businesses, supported only by a 6-year-old city-conducted study showing some correlation between a concentration of adult businesses and crime.[87]

In tackling adverse effects of adult-businesses, cities may limit placement or create adult zones, but they may not completely eradicate them.[88] In *Schad v. Mount Ephraim*, the Supreme Court ruled that adult-businesses may not be zoned out entirely, establishing that a city's zoning powers are not unlimited.[89] Since, courts have also struck down licensing schemes that necessarily foreclose several current adult businesses and zoning laws that render alternate sites unavailable.[90]

2. Nude Dancing

Nude dancing qualifies as a form of expressive conduct falling "only within the outer ambit of the First Amendment's protection."[91] Cities and states may regulate the element of nudity as long as it does not ban performances of sexually explicit movements, but they cannot ban semi-nude, non-obscene dancing.[92] In *Schultz v. City of Cumberland*, the Seventh Circuit struck down a Wisconsin ordinance banning certain sexually explicit movements because it unconstitutionally burdened protected expression.[93]

In *Barnes v. Glen Theatre, Inc.,* the Supreme Court upheld an Indiana law requiring dancers to wear G-strings and pasties.[94] Applying the *O'Brien* test,

84. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (finding that a zoning ordinance that restricted the location of adult bookstores and theaters was permissible because its purpose was to "prevent crime, protect the city's retail trade, maintain property values, and generally [protect] . . . the quality of urban life," not to suppress meaning or expression).

85. *Id.*

86. *See* City of Los Angeles v. Alameda Books, 535 U.S. 425, 438–39, 442 (2002).

87. *Id.*

88. *See* Schad v. Mount Ephraim, 452 U.S. 61, 76 (1981).

89. *Id.*

90. Univ. Books & Videos, Inc. v. Miami-Dade Cty., 132 F. Supp. 2d 1008, 1015, 1018 (S.D. Fla. 2001).

91. *Id.*; City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000); *see also* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) ("Nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so.").

92. *See* Schultz v. City of Cumberland, 228 F.3d 831, 847–48 (7th Cir. 2000).

93. *Id.*

94. *Barnes*, 501 U.S. at 571–72.

Chief Justice Rehnquist argued that Indiana's public-indecency statute was narrowly tailored to advance a substantial government interest in protecting societal order and morality.[95] Nine years later, in *City of Erie v. Pap's A.M.*, a Pennsylvania ordinance requiring erotic dancers to wear pasties and G-strings was upheld based on the secondary effects doctrine.[96] Writing the majority opinion, Justice O'Connor argued that the ordinance was constitutional because it was not related to the suppression of expression but was instead aimed at combating secondary effects of such nightclubs, such as the impact on public health, safety, and welfare.[97]

Justice Stevens and Justice Ginsburg dissented, arguing that the secondary effects doctrine should be used only in zoning cases that geographically circumscribe businesses, and that applying the doctrine to nude dancing was absurd: "To believe that the mandatory addition of pasties and a G-string will have any kind of noticeable impact on secondary effects requires nothing short of a titanic surrender to the implausible."[98] One feminist analysis of the nude dancing cases agrees with the absurdity of the *Pap's A.M.* result and calls into question the "tremendous danger" associated with the nude female body.[99] Others outside of the feminist community also fear the absurdity and illogic of secondary effects in *Pap's A.M.* and believe that the secondary effects doctrine has the potential to "negate all First Amendment protection for all disfavored advocacy."[100]

B. REGULATING THE MEDIA

The government has broad powers to regulate indecent speech that is broadcast widely and for free to the public through radio and broadcast television.[101] Content-based regulations of indecent speech disseminated through mediums

95. *Id.*

96. *Pap's A.M.*, 529 U.S. at 291–92.

97. *Id.*

98. *Id.* at 323 (Stevens, J., dissenting).

99. *See, e.g.*, Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108, 1111 (2005) (questioning why the Court attributed such tremendous danger to the nude female body and wondering, if the nude female body were so dangerous as to be a source of "violence" and "criminal activity," as the Court found, why it accepted the admittedly flimsy solution of a G-string as a legitimate way to ward off such profound danger); *cf.* Sheerine Alemzadeh, *Baring Inequality: Revisiting the Legalization Debate Through the Lens of Strippers' Rights*, 19 MICH. J. GENDER & L. 339, 348 (2013) (explaining how legal doctrine views strippers as threats to public morality, safety, and health instead of protecting strippers from the coercive environment in which they work).

100. Mark Rienzi, *Neutral No More: Secondary Effects Analysis and the Quiet Demise of the Content-Neutrality Test*, 82 FORDHAM L. REV. 1187, 1203 (2013) (stating that many commentators raised concern over secondary effects).

101. *See* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (FCC's ban of indecent speech over public airways was upheld, although the Court reached no consensus on the underlying constitutional issues).

requiring affirmative access—such as cable television, dial-in telephone services, and the internet—are strictly scrutinized. [102]

1. Broadcast Radio and Television

Courts apply a lower standard of review to government regulation of speech broadcast over the radio or television than speech disseminated by other mediums.[103] The justification for this differentiation is that publicly available broadcast media is easily transmitted into the private realm of the home and has the potential to be consumed by unsupervised children with access to radios and televisions, as well as to offend non-consenting adults who have not been warned about the indecent content of the programming.[104] With these concerns in mind, the D.C. Circuit has found it permissible for the FCC to ban indecent broadcasts between 6:00 A.M. and 10:00 P.M.[105] The court reasoned that there is a statistically significant drop in the number of children watching television between the hours of 10:00 P.M. and 6:00 A.M., so the ban shields unsupervised children from indecency without unnecessarily stopping adults from watching indecent material.[106]

2. Cable Television

Because cable providers "have the capacity to block unwanted channels on a household-by-household basis," they are distinguished from broadcast television providers, and regulations of cable communications are strictly scrutinized.[107] The Supreme Court has found that cable providers need not fully scramble or time-limit channels dedicated to sexually explicit programming because less restrictive alternatives, such as partial scrambling or household-by-household blocking, exist.[108]

3. Telephone Services

In *Sable v. FCC*, the Supreme Court declared that a federal ban on interstate obscene telephone services did not violate the First Amendment, although the Court held that the ban in question was not narrowly tailored enough to pass strict scrutiny, and was therefore unconstitutional.[109] The "prurient interest" and "patently offensive" prongs of the *Miller* test for obscenity are defined based on

102. *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 815 (2000) (cable television); Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (dial-a-porn); Reno v. ACLU, 521 U.S. 844, 879 (1997) (the internet).

103. FCC v. League of Women Voters, 468 U.S. 364, 376 (1984).

104. *See Pacifica Found.*, 438 U.S. at 731 n.2, 748–49; *see also Reno*, 521 U.S. at 869 (extending this analysis to the internet and noting that, "The internet is not as 'invasive' as radio or television.").

105. Action for Children's Television v. FCC, 58 F.3d 654, 664 (D.C. Cir. 1995).

106. *Id.* at 666.

107. *Playboy Entm't Grp.*, 529 U.S. at 815.

108. *Id.*

109. Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 124, 131 (1989).

community standards, allowing material to be found obscene in some areas and non-obscene in others.[110] If a dial-a-porn company seeks to provide services that would be deemed obscene in some communities and non-obscene in others, the provider can merely tailor its services to provide them exclusively to communities that would not find them obscene.[111] The Court stated that while this alteration might be expensive, necessary costly adjustments to comply with federal regulations are not unconstitutional and are, instead, simply a burden legitimately placed on entities seeking to provide dial-a-porn services.[112]

4. Internet

The First Amendment protects speech on the Internet, and regulations curtailing internet speech must generally pass strict constitutional scrutiny.[113] However, unlike a dial-a-porn provider, a pornographer cannot limit the geographical distribution of material over the Internet. Thus, in order to satisfy the most conservative community, material that would be protected in some jurisdictions would be restricted nationally under internet obscenity statutes.[114] The Supreme Court has not definitively ruled on whether the burden placed on providers in *Sable* extends to internet providers.[115] In her concurring opinion in *Ashcroft v. ACLU*, Justice O'Connor advocates for a national standard of obscenity for the Internet.[116] She states that *Sable* is not controlling for internet speech, because the internet's audience cannot be as easily controlled as the audience for telephone services.[117]

The court has not ruled on what standard should be applied or on what the providers' burden should be in cases regarding obscenity and the Internet. It has thus far refused to hear cases which would set precedent. The Court refused to hear an appeal from a Sixth Circuit Court of Appeals conviction of a California couple

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110. *See supra* Section I.A.1.

111. *Sable*, 492 U.S. at 125–26 (finding that dial-a-porn providers are "free to tailor" their services to the "communities [they] choose to serve" even at a cost to the company).

112. *Id.* at 125 ("While Sable may be forced to incur some costs in developing and implementing a system for screening the locale of incoming calls, there is no constitutional impediment to enacting a law which may impose such costs on a medium electing to provide these messages.").

113. Reno v. ACLU, 521 U.S. 844, 882 (1997).

114. Nitke v. Ashcroft, 253 F. Supp. 2d 587, 604 (S.D.N.Y. 2003) ("[B]ecause Internet content providers cannot control the geographic distribution of their materials, Internet obscenity statutes restrict protected speech.").

115. *Id.* at 605 (noting that while the three-justice plurality (Thomas, J., Rehnquist, C.J., and Scalia, J.) in *Ashcroft v. ACLU* extended the reasoning of *Sable* to the Internet, a majority of the court would have held that the restrictions allowed under *Sable* related to telephone services would not necessarily apply to the expansive reach of the Internet without first examining the protected speech such restrictions might suppress).

116. Ashcroft v. ACLU, 535 U.S. 564, 587 (2002) (O'Connor, J. concurring) (internal citations omitted) ("[G]iven Internet speakers' inability to control the geographic location of their audience, expecting them to bear the burden of controlling the recipients of their speech, as we did in *Hamling* and *Sable*, may be entirely too much to ask, and would potentially suppress an inordinate amount of expression. . ..For these reasons, adoption of a national standard is necessary in my view for any reasonable regulation of Internet obscenity.").

117. *Id.*

who ran a sexually explicit pre-internet computer message board that included content downloaded in Tennessee and found to be obscene by Tennessee community standards.[118] The circuits remain divided on the question of whether to use a local or national standard for evaluating obscenity. In *United States v. Killbride*, the Ninth Circuit held that a national standard, and not a community standard, should be applied when evaluating obscenity.[119] Though unpublished, the Eleventh Circuit in *United States v. Little* ruled that the Ninth Circuit's interpretation of *Ashcroft v. ACLU* in *Killbride* was incorrect, and a local standard must apply when evaluating obscenity.[120]

The federal government and numerous states have attempted to regulate internet speech to protect minors from sexually explicit material. In 1996, Congress passed the Communications Decency Act (CDA), which made it a criminal offense to transmit or make available to minors "obscene or indecent" communications over the Internet.[121] In *Reno v. ACLU*, the Court held that the CDA's indecency prohibition was a content-based regulation of speech written so broadly[122] that it unconstitutionally chilled free speech.[123] The CDA now only prohibits transmissions to minors that would qualify as obscene under *Miller*.[124] A challenge to the CDA brought on the grounds that the national community standard for obscenity unconstitutionally prohibits significant amounts of protected speech was unsuccessful.[125]

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118. United States v. Thomas, 74 F.3d 701, 711 (6th Cir. 1996).

119. United States v. Killbride, 584 F.3d 1240, 1250 (9th Cir. 2009).

120. United States v. Little, No. 08–15964, 2010 WL 357933, at *164 (11th Cir. Feb. 2, 2010).

121. Communications Decency Act (CDA), 47 U.S.C.A. § 223 (1996).

122. The Court points to the different linguistic forms used in the challenged sections of the CDA. The first section uses the term "indecent," 47 U.S.C.A. § 223(b)(2)(A), and the second describes material that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," Reno v. ACLU, 521 U.S. 844, 844 (1997). These terms are not defined, "provok[ing] uncertainty among speakers about how the two standards relate to each other and just what they mean." *Id.* at 870-71.

123. *Id.* at 845.

124. Nitke v. Ashcroft, 253 F. Supp. 2d 587, 594 (S.D.N.Y. 2003) ("Section 223(a)(1)(B) now prohibits only obscene transmissions to minors by means of a telecommunications device, incorporating the tripartite definition of obscenity established by the Supreme Court in *Miller v. California*.").

125. Barbara Nitke, an art professor and photographer, and the National Coalition for Sexual Freedom challenged the CDA as unconstitutionally overbroad, arguing that the national application of the *Miller* test necessitates that they tailor the material they present on their websites to the standards of the most restrictive communities. Nitke v. Ashcroft, 253 F. Supp. 2d 587, 595. The District Court denied the government's motion to dismiss the overbreadth challenge, offering the plaintiffs the opportunity to further establish the facts and replead. *Id.* at 611. Upon rehearing, the court found that while the plaintiffs had offered evidence that obscenity standards differ from one community to another, they did not prove this phenomenon for the United States as a whole. Nitke v. Gonzales, 413 F. Supp. 2d 262, 272-73 (S.D.N.Y. 2005). Additionally, while plaintiffs evidenced that there is a substantial likelihood that their materials would be considered "patently offensive" and "appealing to the prurient interest" in some communities, they did not prove that the "potential for inconsistent determinations of obscenity is greater than that faced by purveyors of traditional pornography" who can geographically limit their distribution. *Id.* Some have argued that in this holding, the District Court is requiring plaintiffs to meet an impossible evidentiary burden. *See* Alan R. Levy, *Internet Obscenity Decision Imposes Impossible Burden*, 234 N.Y.L.J. 2 (2005).

In 1998, Congress passed the Child Online Protection Act (COPA)[126] in an attempt to protect children from sexually explicit, but not quite obscene, material on the Internet.[127] In *Ashcroft v. ACLU*, the Supreme Court held that COPA was unconstitutional because the government had not used the least restrictive measures of speech restriction available to meet the statute's legitimate objective of protecting minors.[128] The Court vacated and remanded the case.[129] On remand, the Third Circuit upheld the unconstitutionality of COPA and the Supreme Court denied certiorari.[130]

Even before hearing the Court's decision in *Ashcroft v. ACLU,* Congress passed the Children's Internet Protection Act (CIPA),[131] requiring schools and libraries funded by the government under the E-rate program to "enforc[e] a policy of Internet safety" by installing technology on all of their computers that filters out obscene or pornographic images.[132] In *United States v. American Library Association*, the Supreme Court upheld CIPA as satisfying the First Amendment challenge that COPA failed.[133] CIPA passed rational basis[134] review because it allows librarians to disable the filter for adult patrons, upon request.[135] The extent to which legislatures can regulate speech on the Internet and the standards courts choose to apply to determine obscene speech online remain unclear.

C. REGULATING PRIVATE POSSESSION AND DISTRIBUTION

Generally, a state cannot criminalize a private individual's possession of obscene materials.[136] The right to possess obscene materials within the privacy of one's own home, first articulated by the Supreme Court in *Stanley v. Georgia*, is

126. Child Online Protection Act (COPA), 47 U.S.C.A. § 231 (1998) (West, Westlaw through P.L. 117–80).

127. COPA is limited in that it prohibits the distribution of material that is "harmful to minors" rather than material that is "obscene or indecent," and that it only applies to commercial communications. 47 U.S.C.A. § 231(a)(1). COPA also makes the defense available that the communicator required a credit card or used some other form of technology to ascertain the age of the patron. *Id.* § 231(c)(1).

128. Ashcroft v. ACLU, 542 U.S. 656, 657–658 (2004) (filtering technology is less restrictive than content-based banning of speech).

129. *Id.* at 673.

130. ACLU v. Mukasey, 534 F.3d 181 (3d Cir. 2008), *cert. denied*, 555 U.S. 1137 (2009).

131. Children's Internet Protection Act (CIPA), 47 U.S.C.A. § 254 (2001) (West, Westlaw through P.L. 117–80).

132. *Id.* § 254(h)(1)(5)((B)-(C).

133. United States v. Am. Libr. Ass'n, 539 U.S. 194 (2003).

134. Writing for the plurality, Chief Justice Rehnquist asserted that Internet access in libraries does not satisfy the Court's definition of "designated public forum" and therefore does not deserve heightened scrutiny constitutional review. *Am. Libr. Ass'n*, 539 U.S at 206–08. In doing so, he also distinguished the strict scrutiny review called for in *Reno v. ACLU*, because *Reno* dealt with "direct regulation of private conduct" while CIPA simply regulated exercises of Congress' "spending power." *Id.* at 209, n.4 (referencing Reno v. ACLU, 521 U.S. 844, 875 (1997)).

135. *Am. Libr. Ass'n*, 539 U.S. at 209.

136. *See, e.g.*, United States v. Reilly, No. 01-1114, 2003 WL 1878308, at *4–5 (S.D.N.Y. Apr. 14, 2003) (finding that 18 U.S.C.A. § 1462, which criminalizes electronic receipt and transportation of obscene materials, is not unconstitutionally overbroad because it is related to state interest of limiting trafficking of obscene material).

rooted in the First Amendment right to "receive information and ideas, regardless of their social worth," and "to be free except in very limited circumstances, from unwanted governmental intrusions into one's privacy."[137]

However, there is no constitutional right to distribute obscenity.[138] The government can prohibit the transfer of obscenity through the mail[139] or the showing of obscenity to film audiences.[140] Individuals do not have a right to receive obscene material while incarcerated.[141] Given the Supreme Court's stance on the distribution of obscene materials more generally, it is also likely, though still unresolved by the Court, that the government can prohibit individuals from receiving obscenity over the Internet.[142] Congress has also criminalized the distribution of obscenity to involuntary recipients.[143] This includes sending images to minors that are harmful to minors,[144] such as material that appeals to the prurient interest of minors and is patently offensive to the adult community.[145]

States may ban the sale of material to minors that, while not obscene to adults, is considered to be obscene to an audience of minors.[146] However, states cannot restrict adults' access to material simply because the material would be obscene to minors.[147]

Following the Supreme Court's holding in *Lawrence v. Texas,* overturning a Texas law prohibiting same-sex sodomy,[148] at least one court revaluated the right to distribute obscenity.[149] In *United States v. Extreme Associates, Inc*., the Western District of Pennsylvania overturned a federal obscenity conviction based on the view that previous justifications—like protecting the public morality—for obscenity statutes were no longer valid following *Lawrence*.[150] On appeal,

137. *Id.*

138. United States v. Thirty Seven Photographs, 402 U.S. 363, 376 (1971).

139. United States v. Reidel, 402 U.S. 351, 352 (1971).

140. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973).

141. Bahrampour v. Lampert, 356 F.3d 969, 973 (9th Cir. 2004); *see also* Ramirez v. Pugh, 379 F.3d 122, 127 (3d Cir. 2004) (finding it permissible to prohibit prisoner receipt of sexually explicit material because barter of such material may have resulted in prohibited sexual activity).

142. *See, e.g*., United States v. Reilly, No. 01-1114, 2003 WL 1878308, at *4–5 (S.D.N.Y. Apr. 14, 2003) (finding that 18 U.S.C.A. § 1462, which criminalizes electronic receipt and transportation of obscene materials, is not unconstitutionally overbroad because it is related to state interest of limiting trafficking of obscene material).

143. 18 U.S.C.A. § 2252C(a) (West, Westlaw through P.L. 113–234).

144. *Id.* § 2252C(b).

145. *Id.* § 2252C(d) (citing 18 U.S.C.A. § 2252B(d)).

146. Ginsburg v. New York, 390 U.S. 629, 637–39 (1968) (holding that sexual material constitutionally protected for sale to adults is not automatically protected for sale to minors and thus the state can prohibit the sale of material that is obscene to minors and not adults).

147. *See* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 127 (1989).

148. Lawrence v. Texas, 539 U.S. 558, 578 (2003) (finding that the Texas statute "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual").

149. United States v. Extreme Assoc., Inc., 352 F. Supp. 2d 578, 587 (W.D. Pa. 2005).

150. The Court concluded, "[A]fter *Lawrence*, the government can no longer rely on the advancement of a moral code *i.e*., preventing consenting adults from entertaining lewd or lascivious thoughts, as a legitimate, let alone a compelling, state interest." *Extreme Assoc., Inc*., 352 F. Supp. 2d at

however, the Third Circuit Court of Appeals overturned *Extreme Associates*, stating that even if *Lawrence* called previous obscenity distribution cases into question, until the Supreme Court explicitly overturned its long line of cases, lower courts had no right to overturn obscenity statutes based on *Lawrence*.[151]

Some jurisdictions within other circuits have chosen not to follow the district court's reasoning in *Extreme Associates*,[152] while other courts have specifically declined to recognize new sexual privacy rights post-*Lawrence*.[153] It is possible,[154] though not yet challenged legally, that *Lawrence*'s explicit overruling of *Bowers v. Hardwick*[155] could be used to overturn nude dancing cases, such as *Barnes v. Glen Theatre*, which relied heavily on the morality justifications in *Bowers* to ban expressive conduct.[156]

D. REGULATING REVENGE PORNOGRAPHY

"Revenge pornography" or "revenge porn" is "the posting of nude or sexually explicit photos or videos online to degrade or harass someone."[157] The California Penal Code makes it a misdemeanor for someone to distribute:

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587. Additionally, due to the lack of legitimate state interest, regulation of obscenity at either the strict scrutiny or rational basis review level "violates the constitutional guarantees of personal liberty and privacy of consenting adults" accorded under the due process clause of the Fourteenth Amendment. *Id.* at 587.

151. United States v. Extreme Assoc., Inc., 431 F.3d 150, 161 (3d Cir. 2005).

152. *See, e.g.*, United States v. Gartman, No. 3:04-CR-170-H, 2005 U.S. Dist. LEXIS 1501, at *5 n.1 (N.D. Tex. Feb. 2, 2005) (arguing that the defendant's Joint Motion to Reconsider based on *Extreme Associates* was denied because the court disagreed with the interpretation that *Lawrence* "made protecting morality an illegitimate government reason"); State v. Senters, 699 N.W.2d 810, 816 (Neb. 2005) (noting that criminalization of audio recording minors engaged in sexual activity was not called into question by *Lawrence* or *Extreme Associates* because those cases do not undermine the legitimate state interest of preventing child abuse and exploitation).

153. *See, e.g.*, Williams v. Alabama, 378 F.3d 1232, 1236 (11th Cir. 2004) (*Lawrence* did not establish a fundamental right to sexual privacy that would require a strict scrutiny review of Alabama's prohibition of the sale of sexual devices); State v. Jenkins, No. C-040111, slip op. at 4 (Ohio Ct. App. Dec. 30, 2004) (finding that *Lawrence* did not end the legitimacy of morals-based legislation, so obscenity laws do not violate a video store owner's substantive due process rights).

154. *See, e.g.*, Adler, *supra* note 99 at 1108, n.29 ("The *Barnes* plurality relied on *Bowers* for the proposition that regulating morality is a substantial state interest. *Lawrence* has cast a significant doubt on the continuing validity of this proposition.").

155. Bowers v. Hardwick, 478 U.S. 186, 191, 196 (1986) (finding Georgia's criminalization of homosexual sodomy constitutional because there is no fundamental right to engage in such activity and because regulating morality is a substantial state interest), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

156. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 568–69 (1991) (purpose of Indiana's nude dancing statute that required dancers to wear pasties and G-strings was "protecting societal order and morality").

157. Liz Halloran, *Race To Stop 'Revenge Porn' Raises Free Speech Worries,* NAT'L PUB. RADIO, (Mar. 6, 2024, 11:16 AM), https://www.npr.org/sections/itsallpolitics/2014/03/06/286388840/race-to-stop-revenge-porn-raises-free-speech-worries; (Elena Lentz, *Revenge Porn and the ACLU's Inconsistent Approach*, 8 IND. J.L. & SOC. EQUALITY 155, 156 (2020); *see also* People v. Morriale, 20 Misc. 3d 558, 559-60 (N.Y. Crim. Ct. 2008) (explaining that the purpose of Penal Law § 250.55 was to criminalize video voyeurism); People v. Barber, 42 Misc. 3d 1225(A), *1 (N.Y. Crim. Ct. 2014) (holding that although the defendant's conduct in creating and disseminating revenge porn was "reprehensible," it did "not violate any of the criminal statutes under which he was charged").

> [T]he image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in an act of sexual intercourse . . . in which the person depicted participates, under circumstances in which the persons agree or understand that the image shall remain private, the person distributing the image knows or should know that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress.[158]

Some websites that publish these images also publish the names and addresses[159] of targeted women to encourage users to harass them more directly. Anyone can be targeted, but most victims are women.[160]

These statutes are sometimes challenged under the free speech laws.[161] However, the Illinois Supreme Court in 2019 and Minnesota Supreme Court in 2020 upheld the constitutionality of those states' revenge porn statutes.[162] In 2020, forty-six states and the District of Columbia enacted some form of laws against revenge porn.[163]

E. ENFORCEMENT BY POST-BUSH ADMINISTRATIONS

The Bush administration made combating adult obscenity one of its "top priorities."[164] In contrast, the Obama administration was criticized for its decision not to actively pursue adult obscenity prosecutions.[165] The Obama administration received additional criticism on its efforts to prevent sexual assault on college campuses.[166] In a joint letter from the Departments of Justice and Education to the University of Montana, the Obama administration included verbal conduct under the standard for sexual harassment on college campuses.[167] Under that standard, any verbal conduct that is unwelcome and of a sexual nature is considered sexual harassment on college campuses.[168] Also, there is no reasonable person standard—the harassment is judged based on the subjective feelings of the receiver.[169]

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158. CAL. PENAL CODE § 647(j) (West 2021).

159. Roni Rosenberg & Hadar Dancig-Rosenberg, *Reconceptualizing Revenge Porn*, 63 ARIZ. L. REV. 199, 201 (2021).

160. *Id.*

161. Paul J. Larkin, Jr., *Revenge Porn, State Law, and Free Speech*, 48 LOY. L.A. L. REV. 57, 97 (2014).

162. Rosenberg, *supra* note 159 at 202; *see also* People v. Austin, 155 N.E.3d 439, 474 (Ill. 2019); State v. Casilas, 952 N.W.2d 629, 642–47 (Minn. 2020).

163. Rosenberg, *supra* note 159 at 201–02.

164. Barton Gellman, *Recruits Sought for Porn Squad*, WASH. POST, Sept. 20, 2005, at A21 (quoting FBI job recruitment material for federal anti-obscenity squad).

165. *See* Brian L. Frye, *The Dialectic of Obscenity*, 35 HAMLINE L. REV. 229, 236 (2012).

166. Greg Lukianoff, *Feds to Students: You Can't Say That*, WALL ST. J. (May 16, 2013), http://online.wsj.com/articles/SB10001424127887323582904578485041304763554.

167. *Id.*

168. Caroline Kelley, *Debate Rages Over Obama Definition of College Sexual Harassment*, TIME (Jul. 10, 2013), http://swampland.time.com/2013/07/10/debate-rages-over-obama-definition-of-college-sexual-harassment/.

169. Lukianoff, *supra* note 166.

However, in 2016 it appeared that the Obama administration's relaxed policies regarding adult obscenity would soon be reversed after Trump pledged to again prioritize enforcement of adult obscenity laws during his presidential campaign.[170] This promise likely appealed to followers of the cyber conspiracy QAnon, which posits that an elite network of entrenched government actors runs a child sex-trafficking ring.[171] Even so, this promised enforcement did not seem to materialize despite 15 state legislatures declaring pornography as a public health crisis and QAnon gaining momentum among radical conservatives.[172]

Similar to President Trump's campaign promises, during President Biden's campaign, his team proposed a new national taskforce around online abuse, specifically aimed at harms against women, such as "deepfakes," revenge pornography, and sexual assault.[173] Even so, the fade in enforcement of adult obscenity laws seems to be continuing throughout the Biden administration, given that it has remained largely silent on its approach to regulation of the pornography industry and other industries implicated by obscenity laws.[174]

III. THE SPECIAL CASE OF CHILD PORNOGRAPHY

Materials showing minors engaging in sexual acts receive no First Amendment protection and possession of them can be prohibited even if the materials are not deemed "obscene."[175] In *New York v. Ferber*, the Supreme Court held that the government has greater leeway to regulate sexual depictions of children because (1) the state has a compelling interest in "safeguarding the physical and psychological wellbeing" of minors; (2) the distribution of child pornography is linked to sexual abuse of children, which the state has an interest in preventing; (3) the government can legitimately curb the advertising and selling of child pornography to cut off the economic motive to produce it; and (4) there is *de minimis*, if any, value in child pornography.[176] Taking these interests into account, the Court found that child pornography is not protected from regulation under the First Amendment.[177] It is unknown if the rationale in *Ferber* could be extended to

170. Steven Nelson, *Trump Gets Hard Time From Pornographers Over Anti-Obscenity Pledge*, U.S. NEWS (Aug. 1, 2016), https://www.usnews.com/news/articles/2016-08-01/trump-gets-hard-time-from-pornographers-over-anti-obscenity-pledge.

171. Justin Hyland, *Conspiracy Speech: Reimagining the First Amendment in the Age of QAnon*, 44 HASTINGS COMM. & ENT. L.J. 1, 4 (2021).

172. Jeff Mordock, *Pornography Crackdown Vowed by Donald Trump Still Never Materialized*, WASH. TIMES (Dec. 25, 2019), https://www.washingtontimes.com/news/2019/dec/25/pornography-crackdown-vowed-trump-still-never-mate/.

173. Alex Engler, *How Biden Can Take the High Road on Misinformation*, TECH TANK BLOG (Dec. 21, 2020), https://www.proquest.com/docview/2473424663?accountid=36339&parentSessionId=Ecwx1kytT7GvHZGTOQNObgdWddLkn9O0htuFCOVCTCU%3D&pq-origsite=primo.

174. *See generally* Amy Adler, *What's the Harm? The Future of the First Amendment: The Shifting Law of Sexual Speech*, 2020 U. CHI. LEGAL F. 1, 26–27 (2020) (discussing the lack of enforcement of obscenity law since the Bush administration).

175. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 240 (2002).

176. New York v. Ferber, 458 U.S. 747, 756–64 (1982).

177. *Id.*

videos of the sexual abuse of adult victims.[178] At least one critic believes the rationale in *Ferber* should be extended to "snuff films," which depict the rape and murder of women.[179] In practice, prosecutors attempt to use rape pornography they find in defendants' possession as evidence to assist them in the prosecution of the actual abuse, not for the possession or production of the video itself.[180] Evidence of a defendant viewing rape and snuff films has even been used by a defense attorney to show his client was unable to tell right from wrong.[181]

Not only are the sale, production, and transport of child pornography regulated, but the government may also punish individual, private possession of child pornography, as well as knowingly accessing child pornography with the intent to view it.[182] Tangentially, the government may criminalize the solicitation of minors for sexual activity without being constrained by the First Amendment.[183]

Some minors have also been prosecuted for child pornography.[184] Teenagers who "sext" each other by sending "'lascivious' pictures of themselves" have been charged with producing child pornography.[185] In Florida, a teenage girl's delinquency adjudication for violating child pornography laws was upheld.[186] The court found that she had no reasonable expectation of privacy when she shared explicit images of herself with her boyfriend and that it was reasonable to believe that these images would eventually be disseminated through the Internet.[187] The court concluded that the state had a compelling interest in punishing those who produce such harmful materials.[188]

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178. Joseph C. Mauro, *Rethinking "Murderabilia": How States Can Restrict Some Depictions of Crime as They Restrict Child Pornography*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 323, 333 (2012).

179. *Id.*

180. *See generally* Womack v. State, 731 S.E.2d 387 (Ga. Ct. App. 2012); People v. Pelo, 942 N. E.2d 463 (Ill. App. Ct. 2010); McCullum v. Com., No. 2003-SC-001009-MR, 2006 WL 436107 (Ky. Feb. 23, 2006).

181. Schiro v. Clark, 963 F.2d 962, 971 (7th Cir. 1992).

182. Osborne v. Ohio, 495 U.S. 103, 126 (1990); 18 U.S.C.A. § 2252(a)(4)(B) (West, Westlaw through P.L. 113-234).

183. *See, e.g.*, U. S. v. Rowe, 414 F.3d 271, 273 (2d Cir. 2005) (posting offers for pictures of underage nudes and posting offers and solicitations for child pornography is sufficient to constitute notice/advertisement under 18 U.S.C.A. § 2251(c)); U. S. v. Johnson, 376 F.3d 689, 696 (7th Cir. 2004) (conviction for solicitation of minor for sex acts is not violation of protected speech); U. S. v. Dhingra, 371 F.3d 557, 559 (9th Cir. 2004) (criminalizing online inducement of minors to engage in sexual acts was not a First Amendment violation, by imposing a nationwide standard instead of a community standard, because conduct was regulated, not speech); U. S. v. Meek, 366 F.3d 705, 709 (9th Cir. 2004) (criminalization of defendant's solicitation of person intended and thought to be a minor was not a violation of First Amendment even though individual contacted was undercover law enforcement); U. S. v. Hornaday, 392 F.3d 1306, 1308 (11th Cir. 2004) (speech attempting to arrange sexual abuse of minors is not constitutionally protected).

184. Matthew H. Birkhold, *Freud on the Court: Re-interpreting Sexting & Child Pornography Laws*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 897, 899 (2013).

185. *Id.*

186. A.H. v. State, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007).

187. *Id.* at 238–39.

188. *Id.* at 239.

A. FEDERAL COMMERCE CLAUSE IMPLICATIONS

Much of the litigation surrounding federal child pornography regulation concerns whether the material substantially affects interstate commerce.[189] Multiple circuit courts have addressed this issue. Some examples of when courts have upheld convictions under the Commerce Clause include: child pornography produced intra-state for home-use, made with materials that moved interstate;[190] images of a defendant engaging in sexual activity with his 13-year-old daughter stored on a medium that would allow for widespread dissemination over the Internet;[191] or a computer used for the transportation of sexually explicit images of minors.[192] Federal statute has further broadened the jurisdiction to combat child pornography to include scenarios where the child is transported in interstate or foreign commerce, the materials used to produce the child pornography have traveled in interstate or foreign commerce, or when the child pornography has traveled into the United States from abroad or was intended to travel into the United States.[193] The circuit courts have repeatedly upheld the constitutionality of this act through the Commerce Clause.[194]

B. LIMITS ON REGULATING "VIRTUAL" CHILD PORNOGRAPHY

In 1996, Congress passed the Child Pornography Protection Act (CPPA), criminalizing the possession, transmission, or pandering of child pornography.[195] In *Ashcroft v. Free Speech Coalition*, the Supreme Court overturned two sections of CPPA: section 2256(8)(B), which prohibited "any visual depiction" that "is, or appears to be, of a minor engaging in sexually explicit conduct;"[196] and section 2256(8)(D), which criminalized the pandering of any image that is presented or advertised as being of a sexually engaged minor.[197] The Court found that these regulations of virtual child pornography were unconstitutionally overbroad

189. The Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8. To withstand scrutiny, Congress' regulatory actions based on the Commerce Clause must "substantially affect" interstate commerce. U. S. v. Lopez, 514 U.S. 549, 559 (1995).

190. *See* U. S. v. Sharpley, 399 F.3d 123, 125 (2d Cir. 2005); U. S. v. Harris, 358 F.3d 221, 222–23 (2d Cir. 2004).

191. *See* U. S. v. Mugan, 394 F.3d 1016, 1022 (8th Cir. 2005), *vacated on other grounds*, 126 S. Ct. 670.

192. *See* U. S. v. Vasquez, 137 F. App'x 44, 45 (9th Cir. 2005).

193. 18 U.S.C. § 2251 (West, Westlaw through P.L. 113-180 approved 9-26-14).

194. *See, e.g.*, U. S. v. Sullivan, 753 F.3d 845, 854 (9th Cir. 2014); U. S. v. Rose, 714 F.3d 362, 371 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 272 (2013); U. S. v. Culver, 598 F.3d 740, 746–47 (11th Cir. 2010).

195. Child Pornography Protection Act (CPPA), 18 U.S.C.A. §§ 2251-52, 56 (2006) (West, Westlaw through P.L. 113-234).

196. Ashcroft v. Free Speech Coal., 535 U.S. 234, 241 (2002) (quoting and holding as overbroad 18 U.S.C.A. § 2256(8)(B)).

197. *Id.* at 241 (quoting and holding as overbroad 18 U.S.C.A. § 2256(8)(D)).

because they failed to implicate the state interests that justify banning actual pornography: obscenity[198] and abuse of children.[199]

Congress responded to the Court's decision in *Free Speech Coalition* with the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT).[200] The PROTECT Act regulates virtual child pornography by prohibiting pornographic materials that are "indistinguishable from" child pornography[201] and by offering defendants the affirmative defense that the pornography was produced without using an actual minor.[202] This act was upheld by the Supreme Court in *United States v. Williams*, which held that the statute was neither overbroad nor vague.[203] The Court also held that it did not criminalize conduct protected under the First Amendment because the act criminalizes the request or offer of illegal material, child pornography, which is "categorically excluded from the First Amendment."[204]

CONCLUSION

The First Amendment was intended to ensure that "Congress shall make no law . . . abridging the freedom of speech."[205] Yet, the Constitution does not ensure that all speech is treated equally. Speech and expression related to sexual behavior have long been regulated by courts, ranging from indecent material, which is afforded some First Amendment protection, to obscene material and child pornography, which are not protected at all. While much of the jurisprudence surrounding sexual speech has been stable since the 1970s, questions remain as to the scope of the secondary effects doctrine, the breadth of permissible internet regulation, the validity of morality-based regulation post-*Lawrence*, and the constitutionality of regulating "virtual" child pornography.

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198. *Id.* at 246 (noting CPPA does not require that images "appeal to the prurient interest" or allow an exception for materials with literary, artistic, or scientific value).

199. *Id.* at 235–36 (noting virtual images are distinguishable from actual images of children because they do not create victims through their production and are not "intrinsically related" to child abuse).

200. In the Congressional findings related to Title V of the PROTECT Act, Congress explained that without Congressional action, prosecutors nationwide would continue to be burdened in bringing child pornography cases by having to refuse bringing meritorious cases and having to prove that the children depicted in the pornographic images are actual, not virtual. *See* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (PROTECT Act), 18 U.S.C.A. § 2251 (2003) (West, Westlaw through P.L. 113-234).

201. Here, Congress uses the language "indistinguishable from" instead of "appears to be," which is used in CPPA. 18 U.S.C.A. §§ 2252B, 2256(8)(B).

202. The Court in *Ashcroft v. Free Speech Coalition* offered the possibility that had CPPA's affirmative defense been more complete, it could have saved the overturned provisions: "Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is insufficient because it does not apply to possession or to images created by computer imaging, even where the defendant could demonstrate no children were harmed in producing the images." Ashcroft v. Free Speech Coal., 535 U.S. 234, 237 (2002). The PROTECT Act affirmative defense covers images created by computer imaging. 18 U.S.C.A. § 2252A(c).

203. U. S. v. Williams, 553 U.S. 285, 297, 306–307 (2008).

204. *Id.* at 298–99.

205. U.S. CONST. amend. I.