

**OBSCENITY IS NOT AND SHOULD NOT BE PROTECTED
BY THE FIRST AMENDMENT**

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In Miller v. California¹, the Supreme Court reaffirmed its earlier holding in Roth v. United States², that obscenity is not within the area of constitutionally protected speech or press. The Supreme Court in Miller held that material is obscene and hence lacks any protection under the First Amendment if: (a) the average person, applying contemporary community standards, would find that the work, taken as a whole, appealed to the prurient interest; (b) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.³ The Miller definition has been utilized for almost 25 years and has stood the test of time well.⁴ It has given rise

¹413 U.S. 15 (1973).

²354 U.S. 476 (1957).

³413 U.S. at 24.

⁴This is contrary to the Court's experience with the test for obscenity initially announced in the
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to a coherent body of law that has served as a useful guideline to federal, state and local governments in drafting anti-obscenity legislation and in providing guidance to those involved in the business of the commercialization of sexually explicit material of what is and what is not constitutionally protected activity.

The Supreme Court in Miller made several significant changes in its test for obscenity that has resulted in making the Miller test a more definitive and practical definition. First, the Miller Court rejected the “utterly without redeeming social value” test articulated by a plurality of three Justices in 1966 in Memoirs v. Massachusetts⁵ which required that to prove obscenity it must be affirmatively established that the material is utterly without redeeming social value. The Memoirs plurality had drastically altered the Roth test by requiring the government to prove a negative, i.e., that the material was “utterly without redeeming social value”, a burden virtually impossible to discharge under criminal standards of proof. The Court substituted as an element of the Miller test the requirement that the work, taken as a whole, lack serious literary, artistic, political, or scientific value. In deciding

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Roth case, supra note 2, as that test was modified in Memoirs v. Massachusetts, 383 U.S. 413 (1966). Given the wide disparity of views among the members of the Supreme Court, the Court began the practice in Redrup v. New York, 386 U.S. 767 (1967), rehearing denied 388 U.S. 924 (1967), of per curiam reversals of convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, deemed not to be obscene. However, with the arrival of the Court majority in the Miller case, the Miller definition has consistently been supported by the majority of the Court despite a change over time in its composition, and has provided a stable framework for almost 25 years for determining what material is obscene and hence receives no constitutional protection under the First Amendment.

⁵Supra note 4.

this question, the test is whether a reasonable person would find serious literary, artistic, political, or scientific value in the material taken as a whole.⁶

Perhaps most importantly, the Miller Court for the first time required that statutes regulating obscene materials go beyond a generic formula in defining what sexual conduct cannot be depicted or described in a patently offensive way; the sexual conduct must be specifically defined. The Court went so far as to give an example of the sort of specific definition required by the Miller obscenity test:

We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under the second part (b) of the standard announced in this opinion, supra:

- (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
- (b) Patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of the genitals.⁷

The Court's opinion in Miller makes clear that the above is merely an example of the kind of permissible state regulation and that states are free to include other patently offensive hardcore sexual conduct the depiction or description of which could be prohibited. Indeed, in the subsequent case

⁶Pope v. Illinois, 481 U.S. 497, at 501 n.3 (1987).

⁷413 U.S. at 25.

of Ward v. Illinois,⁸ the Court upheld a conviction under a state obscenity statute based on material depicting sadomasochism since the Illinois Supreme Court had expressly interpreted the Illinois State Statute to include a prohibition on sadomasochistic depictions.

This specificity requirement is an essential element of the Miller decision. As the Court states in Miller:

Under the holding announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive ‘hardcore’ sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution. . . . If the inability to define regulated materials with ultimate, god-like precision altogether removes the power of the States or Congress to regulate, then ‘hardcore’ pornography may be exposed without limit to the juvenile, the passerby and the consenting adult alike, as indeed, Mr. Justice Douglas contends. . . . In this belief, however, Mr. Justice Douglas now stands alone.⁹

The specificity requirement embodied in the Miller test for obscenity was aimed at ending the ambiguity in defining “obscenity” and to a large extent this goal has been achieved with post-Miller litigation focusing largely on the constitutionality of statutes regulating speech rather than on the correctness of the lower Court’s determination under valid statutes.¹⁰ As the foregoing analysis shows, and as the cases have demonstrated over the past 25 years, the Miller test has made it possible to define and regulate obscenity with reasonable certainty. While there will always be hard cases or

⁸431 U.S. 767 (1977).

⁹413 U.S. at 27.

¹⁰See e.g., Marian D. Hefner, “Roast Pigs” and Miller-Lite : Variable Obscenity in the Nineties, 1996 University of Illinois Law Review 843.

close cases as to which side of the line particular material may fall, that exists in virtually every area of the law and does not constitute a reason not to regulate an area otherwise deserving of regulation. Judges and juries decide every day in the routine adjudication of cases how to classify specific factual circumstances and how to apply general legal principles to specific facts. The fact that reasonable judges or jurors can disagree over the application of general principles to specific facts or in their attempts to draw lines as to what is or is not permissible conduct under existing law is hardly a reason not to regulate or legislate with respect to a given subject matter. Thus those who argue that it is impossible to define obscenity because of the allegedly difficult nature of the line drawing assert a faulty argument that is an argument for anarchy since the same argument could be used with respect to almost all government regulation. As stated by the Supreme Court in Miller:

Mr. Justice Brennan, author of the opinions of the Court, or the plurality opinions, in Roth v. United States, Jacobellis v. Ohio, Ginzburg v. United States (1966), Mishkin v. New York (1966), and Memoirs v. Massachusetts, has abandoned his former position and now maintains that no formulation of this Court of the Congress or the States can adequately distinguish obscene material unprotected by the First Amendment from protected expression. Paris Adult Theatre v. Slaton (1973) (Brennan, J., dissenting). Paradoxically, Mr. Justice Brennan indicates the suppression of unprotected obscene material is permissible to avoid exposure to unconsenting adults, as in this case, and to juveniles, although he gives no indication of how the division between protected and non-protected materials may be drawn with greater precision for these purposes and for regulation of commercial exposure to consenting adults only. . . . If the inability to define regulated materials with ultimate, god-like precision altogether removes the power of the States or the Congress to regulate, then 'hardcore' pornography may be exposed without limit to the juvenile, the passerby and the consenting adult alike. . . .¹¹

The Court in Miller goes on to note that:

¹¹413 U.S. at 27.

“The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged. As this Court observed in Roth v. United States, ‘it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system.’”¹²

There are several reasons why obscenity should not be protected by the First Amendment. First, as set forth in Justice Brennan’s majority opinion for the Court in Roth v. United States,¹³ the drafters of the First Amendment and the states that ratified it did not intend the First Amendment to protect obscenity. The Roth opinion notes that the freedom of speech and press placed in the First Amendment were never considered absolute and that at the time of the Bill of Rights, libel could be prosecuted.¹⁴ The Roth Court also cited the statutes on blasphemy and profanity that predate the Bill of Rights and quoted a Massachusetts statute of the era making it criminal to publish “any filthy, obscene, or profane song, pamphlet, libel or mock sermon in imitation or mimicking of religious services.”¹⁵ The Roth Court asserted that the Massachusetts statute showed that profanity and obscenity were related offenses. The Roth Court cited other statutes from the other 12 colonies and from Vermont in support of its conclusion that at the time of the adoption of the First Amendment, the framers and the ratifiers thereof could not have believed that they were providing any protection

¹²Id.

¹³Supra note 2.

¹⁴Id. at 482.

¹⁵Id. at 483.

to obscenity. Thus the Supreme Court concluded that it was never the intent of the First Amendment to provide any protection to obscenity.

As stated by the Roth Court, “at the time of the adoption of the First Amendment obscenity law was not as fully developed as libel law, but there was sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press.”¹⁶ Since it is the function of the Supreme Court to interpret the First Amendment and other parts of the Constitution as intended by the drafters and ratifiers thereof, obscenity should not be protected under the First Amendment. While there may be room to debate as to how obscenity should be defined, it is clear that obscenity is not protected by the First Amendment.

In Roth, the Court also noted that in Commonwealth v. Sharpless,¹⁷ a Pennsylvania court had held that it was an offense at common law to exhibit for profit a picture of a nude couple. Obscenity had been recognized as an offense at common law previously in England.¹⁸ The Roth Court also cited several Supreme Court opinions that demonstrated that the “Court has always assumed that obscenity is not protected by the freedoms of speech and press.”¹⁹

¹⁶Id. at 483. For an argument that the explicit depiction of violence should also be considered “obscene” and also undeserving of First Amendment protection, see Kevin W. Saunders, Media Violence and the Obscenity Exception to the First Amendment, 3:1 William and Mary Bill of Rights Journal 107 (1994).

¹⁷ 2 S.R. 91 (1815).

¹⁸ Rex v. Wilkes, 4 Burr. 2527 (K.B. 1770).

¹⁹ Roth, 354 U.S. at 481 (citing Beauharnais v. Illinois, 343 U.S. 250, 266 (1953); Winters v. New York, 333 U.S. 507, 510 (1948); Hannegan v. Esquire, Inc., 327 U.S. 146, 158 (1946); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Near v. Minnesota, 283 U.S. 693 (1931); Hoke v. United (continued...)

The second reason why obscenity should not be protected by the First Amendment is that obscenity, as it has been defined in Miller, constitutes valueless speech that is not an essential part of any exposition of ideas. As stated by Justice Brennan for the Court in Roth,²⁰ and as reiterated by Chief Justice Burger for the Court in Miller:

“All ideas having even the slightest redeeming social importance -- unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion -- have full protection of the [First Amendment] guaranties, unless excludable because they encroach upon a limited area of more important interest. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . . This is the same judgment expressed by this Court in Chaplinsky v. New Hampshire (1942).

‘. . . There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .’ [Emphasis by Court in Roth opinion].

We hold that obscenity is not within the area of constitutionally protected speech or press.²¹

¹⁹(...continued)
States, 227 U.S. 308 (1913); Public Clearinghouse v. Coyne, 194 U.S. 497 (1904); Robertson v. Baldwin, 165 U.S. 275 (1897); United States v. Chase, 135 U.S. 255 (1890); Ex Parte Jackson, 96 U.S. 727 (1877)).

²⁰ Id. at 484-485.

²¹ 413 U.S. at 20-21.

Obscenity is speech far afield from the central concern of the First Amendment which, broadly speaking, is effective popular control of public affairs.²² Obscenity has no value in the marketplace of ideas. Justice Holmes introduced the “marketplace of ideas” concept in his famous dissent in Abrams v. United States.²³ His premise, which has become a major justification for free speech, stated:

When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas, - that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution.²⁴

Obscenity is valueless speech which makes no contribution to the marketplace of ideas and is far removed from the political speech at the core of the First Amendment. As stated by the Supreme Court in Miller:

The dissenting justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a ‘misuse of the great guarantees of free speech and free press. . . .’ The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or

²²See e.g., New York Times v. Sullivan, 376 U.S. 254, 269 (1964) where the Court stated: “[The First Amendment] was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” (Quoting Roth, 354 U.S. at 484).

²³250 U.S. 616 (1919).

²⁴Id. at 630 (Holmes, J., dissenting). The Supreme Court’s reliance on the marketplace concept appears in many opinions. See e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323, 339, 41 L.Ed.2d 789 (1974); Keyishian v. Board of Regents, 285 U.S. 589, 603, 17 L.Ed.2d 629 (1967); New York Times v. Sullivan, 376 U.S. 254, 270, 11 L.Ed.2d 686 (1964).

scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. ‘The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. ‘. . . But the public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.’

There is no evidence, empirical or historical, that the stern 19th century American censorship of public distribution and display of material relating to sex, . . . in any way limited or affected expression of serious literary, artistic, political, or scientific ideas.²⁵

Likewise, there is no evidence that the banning of obscenity as defined in Miller has adversely affected or limited in any way the expression of serious literary, artistic, political or scientific ideas. The Courts have been able to distinguish between commerce in ideas and commercial exploitation of obscene material. Non-obscene sexually oriented material with some arguably artistic value remains readily available.

The prurient, patently offensive depiction or description of sexual conduct that lacks serious literary, artistic, political or scientific value is speech that contributes nothing to the marketplace of ideas and hence is speech which fails to merit First Amendment protection. As noted by the Miller Court, sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places. While the First Amendment protects commerce in ideas, it does not protect and should not protect commercial exploitation of obscene material.²⁶

²⁵413 U.S. at 34.

²⁶It should be noted that “pornography” is not identical to obscenity. Pornography refers to the
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Third, the state has a legitimate governmental interest in outlawing obscenity. These interests include the preservation of the quality of life and of the total community environment, protection of the public safety, and the right to maintain a decent society and to protect the public social interest in order and morality. In Paris Adult Theatre I v. Slaton,²⁷ a companion case to Miller decided simultaneously by the Court with Miller, the Supreme Court recognized that States “had a long recognized legitimate interest in regulating the use of obscene material in local commerce and in all

²⁶(...continued)

depiction of sexual organs or sexual conduct but includes material that may have serious value. The word “pornography” is derived from the Greek “pornographos,” literally “writing about prostitutes.” The word first surfaced in the Oxford English Dictionary in 1857, and first appeared in a 1769 French treatise, called Le Pornographe, in reference to writing about prostitution. By comparison, obscenity is a legal term. For a discussion of the meanings of pornography, eroticism and obscenity, see Nicholas Wolfson, Essay - Eroticism, Obscenity, Pornography And Free Speech, 60 Brooklyn Law Review 1037 (1994).

Not all pornography is obscene. Non-obscene adult pornography receives First Amendment protection, see e.g., Sable Communications v. FCC, 492 U.S. 115 (1989) (invalidating a total ban on dial-a-porn services), although the Supreme Court has decided that non-obscene pornographic materials that have some arguably artistic value are entitled to a lesser degree of First Amendment protection than other forms of protected expression. See City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Young v. American Mini-Theatres, Inc., 427 U.S. 50 (1976). For example, the Supreme Court has allowed the regulation by zoning ordinances of the location of adult theatres which show non-obscene pornographic films or provide other forms of non-obscene erotic entertainment. Such regulation furthers the legitimate state interest in controlling the serious secondary effects of adult theatres showing non-obscene pornographic material - i.e., the prevention of crime, protection of a city’s retail trade, maintenance of property values, and preservation of the city’s neighborhoods, commercial districts, and quality of life. City of Renton v. Playtime Theatres, Inc., 475 U.S. at 48. Child pornography can be banned altogether because of the state’s compelling interest in protecting minors. Osborne v. Ohio, 495 U.S. 103 (1990); New York v. Ferber, 458 U.S. 747 (1982).

²⁷ 413 U.S. 49 (1973).

places of public accommodation.’²⁸ The Paris Adult Theatre Court went on to state that it was reasonable for the state to conclude that commercialized obscenity injured the community as a whole.

The Court stated:

But, it is argued, there is no scientific data which conclusively demonstrates that exposure to obscene material adversely affects men and women or their society. It is urged on behalf of the petitioners that, absent any such demonstration, any kind of state regulation is impermissible. We reject this argument. It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself. . . . Although there is no conclusive proof between anti-social behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist. In deciding Roth, this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect ‘the social interest in order and morality.’ Roth v. United States, quoting Chaplinsky v. New Hampshire (1942) (Emphasis added in Roth).

From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs. . . .

Likewise, when legislatures and administrators act to protect the physical environment from pollution and to preserve our resources of forests, streams and parks, they must act on such imponderables as the impact of a new highway near or through an existing park or wilderness area. . . . The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional. If we accept the unprovable assumption that a complete education requires certain books, see Board of Education v. Allen, (1968) . . . and the well known 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 anti-social behavior? . . .

²⁸ Id. at 57.

. . . Commercial exploitation of depictions, descriptions or exhibitions of obscene conduct on commercial premises open to the adult public falls within a state's broad power to regulate commerce and protect the public environment. The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as 'wrong' or 'sinful'. The states have the power to make a morally neutral judgment that public exhibition of obscene material, or commence in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Mr. Chief Justice Warren's words, the States' 'right . . . to maintain a decent society.'²⁹

The United States Attorney General's Commission on Pornography compiled an extensive body of testimony showing a link between the production of pornography and law-breaking. The Attorney General's Final Report cited recent studies which found a correlation between pornography and sexual violence even when controls are instituted for possible compounding variables, such as police practices, propensity to report rape, etc.³⁰ While the evidence is in conflict, there is evidence which shows an association between the growth of pornography in particular areas with increases in rape and other forms of sexual violence. In the United States, for example, the incidents of reported rape within states is closely correlated with the mass circulation of pornography.³¹ Commentator Edward Donnerstein reviewed empirical studies and concluded that although drawing a straight forward definitive conclusion about the relationship between pornography and aggression is difficult to make, it appears that "the aggressive content of pornography . . . is a main contributor to violence

²⁹Id. at 60-63.

³⁰Attorney General's Commission on Pornography, U.S. Department of Justice, Final Report 392 (1986) [hereinafter Attorney General's Final Report].

³¹See Barron and Strauss, Sexual Stratification, Pornography and Rape in The United States, in PORNOGRAPHY AND SEXUAL AGGRESSION 206 (N. Malamuth & E. Donnerstein eds., 1984).

against women.’³² Thus, there is some empirical evidence that the existence of pornography increases the aggregate level of sexual violence. Another source of evidence concerning the harm caused by pornography is victim testimony which shows that many perpetrators of sexual violence use pornography. Police reports also attest to the connection, and there is evidence showing a relationship between pornography and abuse of women.³³ Thus, there is evidence indicating a link between pornography and violence; while the evidence may not be dispositive, it is strongly suggestive of such a link and certainly provides a rational basis for the enactment of legislation which outlaws obscenity.

Another harmful effect of pornography noted by commentators stems from the role it plays as a conditioning factor in the lives of both men and women. Pornography acts as a filter through which men and women perceive gender roles and relationships between the sexes.³⁴

³²Donnerstein, Pornography: Its Affect On Violence Against Women in PORNOGRAPHY AND SEXUAL AGGRESSION 53, 78-79 (N. Malamuth & E. Donnerstein eds., 1984).

³³See Champion, Clinical Perspectives on the Relationship between Pornography and Sexual Violence, 4 Law & Inequality 22, 25 (1986); Cass R. Sunstein, Pornography and the First Amendment, 1986 Duke Law Journal 589.

³⁴Cass R. Sunstein, Pornography and the First Amendment, supra at 601. It should be noted that some feminists, e.g., Catherine MacKinnon and Andrea Dworkin, have created a definition of pornography aimed at altering the socialization of men and women. Pornography is the graphic sexually explicit subordination of women whether in pictures or words; it is sexually explicit material which demeans women. In American Booksellers Association v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd, 106 S. Ct. 1172 (1986), the United States Court of Appeals for the Seventh Circuit invalidated anti-pornography legislation of this nature on the ground it violated the First Amendment because it discriminated on the basis of viewpoint. The Court held that the Indianapolis ordinance created a government approved view of women, of how they may react to sexual encounters, and how the sexes may relate to each other. The First Amendment forbids the state from ordaining a particular view of women and proscribing other views. Speech treating women in the disapproved
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As stated by the Supreme Court in Paris Adult Theatre I:

In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to the passerby. Rights and interests other than those of the advocates are involved. . . . These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself. The Hill-Link Minority Report of the Commission on Obscenity and Pornography indicates that there is at least an arguable correlation between obscene material and crime. Quite apart from sex crimes, however, there remains one problem of large proportions apply described by Professor Bickel:

‘It concerns the tone of the society, the mode, or to use terms that have perhaps greater currency, the style and quality of life, now and in the future. A man may be entitled to read an obscene book in his room, or expose himself indecently there. . . . We should protect his privacy. But if he demands a right to obtain the books and pictures he wants in the market, and to foregather in public places --discreet, if you will, but accessible to all --with others who share his taste, then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies. Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), what is commonly read and seen and heard and done intrudes upon us all, want it or not. . . . As Mr. Chief Justice

³⁴(...continued)

way - as submissive in sexual matters or as enjoying humiliation - is unlawful under the Indianapolis ordinance no matter how significant the literary, artistic or political qualities of the work taken as a whole. Thus the ordinance also failed to meet the Miller obscenity test and outlawed material protected by the First Amendment. The Supreme Court summarily affirmed the Court of Appeals decision. It is clear that attempts to define and outlaw pornography as a practice that discriminates against women and that degrades and demeans women violates the First Amendment prohibition on viewpoint regulation of speech. The Supreme Court made clear in R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) that the First Amendment requires content neutral and viewpoint neutral regulation of even otherwise unprotected speech (in that case, the regulation of “fighting words”).

Warren stated, there is a ‘right of the nation and of the states to maintain a decent society. . . .’³⁵

The dissent in Paris Adult Theatre I argued that the effort to suppress obscenity is predicated on unprovable, although strongly held, assumptions about human behavior, morality, sex and religion and that the existence of these assumptions cannot validate a statute that substantially undermines the guarantees of the First Amendment. This argument is faulty in several respects. First, as noted by the majority opinion in Paris Adult Theatre I, the state is allowed to legislate as long as there is a reasonable basis for the legislation without having to present conclusive proof of the connection between anti-social behavior and obscene material. As stated by the Court in Paris Adult Theatre I:

From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs. . . . On the basis of these assumptions, both Congress and state legislators have, for example, drastically restricted associational rights by adopting anti-trust laws, and have strictly regulated public expression by issuers of and dealers in securities, profit sharing ‘coupons’, and ‘trading stamps,’ commanding what they must and may not publish and announce.³⁶

Furthermore, the Court noted that the Constitution does not incorporate the proposition that conduct involving consenting adults only is always beyond state regulation:

The issue in this context goes beyond whether someone, even the majority, considers the conduct depicted as ‘wrong’ or ‘sinful’. The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to

³⁵413 U.S. at 57-59.

³⁶413 U.S. at 61.

endanger the public safety, or to jeopardize, in Mr. Chief Justice Warren's words, the State's right to maintain a decent society.³⁷

In Barnes v. Glen Theatre, Inc.,³⁸ a case in which the Supreme Court upheld the constitutionality of an Indiana public indecency law which prohibited nudity in any public place and in which the Court upheld the constitutionality of the statute as applied to non-obscene nude dancing, Justice Scalia noted in his concurring opinion that the Henry David Thoreau philosophy of "you may do what you like so long as it does not injure someone else" was not written into the Constitution. Justice Scalia stated:

The purpose of Indiana's nudity law would be violated, I think, if 60,000 fully consenting adults crowded into the Hoosier Dome to display their genitals to one another, even if there were not an offended innocent in the crowd. Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, 'contra bonos mores,' i.e., immoral. . . .The purpose of the Indiana statute, as both text and enforcement demonstrate, is to enforce the traditional moral belief that people should not expose their private parts indiscriminately, regardless of whether those who see them are disedified.³⁹

Such activities, Justice Scalia noted, included sadomasochism, cock fighting, bestiality, suicide, drug use, prostitution and sodomy.⁴⁰

Justice Rehnquist, writing for the Court in Barnes, reasoned that the state's interest in regulating public nudity was unrelated to expression; rather "public indecency statutes . . . reflect

³⁷413 U.S. at 69.

³⁸501 U.S. 560 (1991).

³⁹Id. at 575.

⁴⁰Id.

moral disapproval of people appearing in the nude among strangers in public places.”⁴¹ Justice Rehnquist noted that the traditional police power of the states is defined as the authority to provide for the public health, safety and morals. Quoting from the Court’s decision in Bowers v. Hardwick,⁴² which upheld the constitutionality of Georgia’s sodomy law, Justice Rehnquist stated in his opinion for the Court in Barnes:

“The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the Courts will be very busy indeed.”⁴³

Justice Rehnquist concluded for the Court in Barnes that the public indecency statute furthers a substantial government interest in protecting order and morality, an interest unrelated to the suppression of free expression, and hence the statute is constitutional.⁴⁴

Thus, under this rationale, even in the absence of any proof of any harmful effects upon others, and even if it could be limited solely to consenting adults, obscenity should be proscribed in order to further the social interest in morality. Moral judgments form the underpinning for all law which regulates the conduct of the individuals who make up the community. The state, in enacting legislation, constantly makes value judgments of what is right and wrong. To deny that this is an acceptable basis for the regulation of obscenity, when it exists with respect to all other kinds of

⁴¹Id. at 568.

⁴²478 U.S. 186 (1986).

⁴³501 U.S. at 569.

⁴⁴501 U.S. at 569-570.

regulation, is to attempt to treat obscenity differently than all other matters which are the subject of governmental regulation.

To summarize, prurient, patently offensive depiction or description of sexual conduct that lacks serious literary, artistic, political or scientific value does not merit First Amendment protection. Such material contributes nothing to the marketplace of ideas. Obscenity is not an essential part of any exposition of ideas and is of such slight social value as a step to truth that any benefit derived from such material is clearly outweighed by the social interest in order and morality. Obscenity is valueless speech which the state has a legitimate interest in prohibiting and sanctioning in order to preserve the quality of life, the community environment, the public safety and a decent society and in order to protect the social interest in order and morality. Obscenity never has been and never should be within the area of constitutionally protected speech under the First Amendment.