



OBSCENITY AND THE FIRST AMENDMENT

STATEMENT OF

JANET M. LARUE, CHIEF COUNSEL, CONCERNED WOMEN FOR AMERICA

SUMMIT ON PORNOGRAPHY

RAYBURN HOUSE OFFICE BUILDING, ROOM 2322

MAY 19, 2005

Until 1957, no one since the beginning of the Republic had argued that obscenity was protected by the First Amendment. In *Roth v. United States*¹ and the companion case, *Alberts v. California*,² Supreme Court Justice William Brennan, one of the most liberal members of the Court, soundly dismissed the notion. He wrote:

Implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all the 48 states, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. We hold that obscenity is not within the area of constitutionally protected speech or press.

The Supreme Court, including every current member, has in the nearly 50 years since *Roth* reaffirmed its holding numerous times.³

¹ 354 U.S. 476 (1957).

² 354 U.S. 476 (1957).

³ In *Ashcroft v. ACLU*, ___ U.S. ___, 124 S. Ct. 2783 (2004), the Court affirmed a Third Circuit ruling preliminarily enjoining the Child Online Protection Act, which involved “material harmful to minors,” otherwise known as material that is obscene for minors but legal for adults. The majority distinguished obscenity: “Further, if the injunction is upheld, the Government in the interim can enforce obscenity laws already on the books.” *Id.* at 2794.

Justice John Paul Stevens reaffirmed that obscenity is unprotected in his concurring opinion joined by Justice Ruth Bader Ginsberg. *Id.* at 2796.

Justice Stephen Breyer’s dissent, joined by Justices Sandra Day O’Connor and Antonin Scalia and Chief Justice William Rehnquist, stated with respect to obscenity: “In sum, the Act’s definitions limit the statute’s scope to commercial pornography. It affects unprotected obscene material.” *Id.* at 2800.

Justice Clarence Thomas wrote in his concurring opinion in *Ashcroft v. ACLU*, 535 U.S. 564 (2002): “Consequently, only the CDA’s [Communications Decency Act] ban on the knowing transmission of obscene messages survived scrutiny because obscene speech enjoys no First Amendment protection.” *Id.* at 569.

Justice Anthony Kennedy made the same distinction between analysis of protected vs. unprotected speech in his majority opinion in *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000): “Second, all parties bring the case to us on the premise that Playboy’s programming has First Amendment protection. As this case has been litigated, it is not alleged to be obscene; ... [t]hese points are undisputed.” *Id.* at 811. Justice Kennedy reiterated this point in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002): “The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and

When the subject is pornography, it is important to define our terms. Pornography is a generic term for “all sexually oriented material intended primarily to arouse the reader, viewer or listener.” Legal pornography includes air-brushed nudity and soft-core material. Obscenity is a legal term of art that defines illegal pornography, both writings⁴ and depictions that are not protected by the First Amendment. The Supreme Court has used the term “hard-core pornography” to refer to depictions of hard-core sex acts,⁵ which may be found obscene.

The test to determine whether material is obscene comes from the Supreme Court’s ruling in *Miller v. California*⁶:

(1) whether the average person, applying contemporary adult community standards,⁷ would find that the material, taken as a whole, appeals to a prurient interest in sex (*i.e.*, an erotic, lascivious, abnormal, unhealthy, degrading, shameful, or morbid interest in nudity, sex, or excretion); and

(2) whether the average person, applying contemporary adult community standards, would find that the work depicts or describes, in a patently offensive way, sexual conduct (*i.e.*, ultimate sex acts, normal or perverted, actual or simulated; masturbation; excretory functions; lewd exhibition of the genitals; or sadomasochistic sexual abuse); and

pornography produced with real children. ...[T]hese categories may be prohibited without violating the First Amendment.” *Id.* at 245-246.

Justice Stevens made the same distinction writing for the majority in *Reno v. ACLU*, 521 U.S. 844 (1997): “[T]he CDA’s provisions criminalized legitimate protected speech (including sexually explicit indecent speech) as well as unprotected obscene speech, and thus were overinclusive.” *Id.* at 874. He added, “Transmitting obscenity and child pornography, whether via the Internet or other means, is already illegal under federal law for both adults and juveniles.” And also in his opinion in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978): “Obscenity may be wholly prohibited.” *Id.* at 745.

In *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989), Chief Justice Rehnquist and Justices O’Connor, Scalia and Kennedy joined the majority ruling, which affirmed that strict-scrutiny analysis applies to protected speech but not to obscenity: “In contrast to the prohibition on indecent communications, there is no constitutional barrier to the ban on obscene dial-a-porn recordings. We have repeatedly held that the protection of the First Amendment does not extend to obscene speech.” *See, e. g., Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973). *Id.* at 124.

⁴ *Kaplan v. California*, 413 U.S. 115 (1973).

⁵ *Jenkins v. Georgia*, 418 U.S. 153 (1974).

⁶ 413 U.S. 15 (1973).

⁷ *Reno v. ACLU*, 521 U.S. 844 (1997): Federal obscenity laws apply to the Internet, which means that *Miller v. California*, 413 U.S. 15 (1973), which references community standards, should apply to the Internet: “The average person applying contemporary community standards” is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one.” *See also Smith v. United States*, 431 U.S. 291 (1977): Community standards are not an element of the obscenity offense. It is a measure or reference point for the jury; *Hamling v. United States*, 418 U.S. 87 (1974): It does not mean a precise geographical area nor the juror’s individual standard; *Jenkins v. Georgia*, 418 U.S. 153 (1974): Constitutionally permissible to not specify the community.

(3) whether a reasonable person would find that the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁸

The *Miller* Court gave what it referred to as a “few plain examples” of the kinds of hard-core pornography that would meet the above three-prong 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 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. ...

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. At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection.

The federal obscenity statutes are codified at 18 U.S.C. §§ 1460-1470. They prohibit the use of instrumentalities of interstate and foreign commerce, the U.S. mail, federal buildings and land to produce, distribute or acquire obscene material.⁹

The Supreme Court held in *Stanley v. Georgia*¹⁰ that an individual who merely possesses obscenity in his or her own home may not be prosecuted; however, the recent ruling in *U.S. v. Extreme Associates*,¹¹ which declared the federal obscenity statutes unconstitutional as applied to the defendants’ Web site, has no support under *Stanley* or any subsequent cases,¹² including

⁸ See *Miller v. California*, 413 U.S. 15, at 24-25 (1973); *Smith v. United States*, 431 U.S. 291, at 300-02, 309 (1977); *Pope v. Illinois*, 481 U.S. 497, at 500-01 (1987) (providing the three-prong constitutional criteria for federal and state laws and court adjudications).

⁹ 18 U.S.C. §1460 prohibits possession with intent to sell, and sale of obscene matter on federal property. 18 U.S.C. §1461 prohibits mailing obscene or crime-inciting matter. 18 U.S.C. §1462 prohibits importation or transportation of obscene matter, including via interactive computer services. 18 U.S.C. §1463 prohibits mailing indecent matter on wrappers or envelopes. 18 U.S.C. §1464 prohibits broadcasting obscene language. 18 U.S.C. §1465 prohibits transportation of obscene matter for sale or distribution, including interactive computer services. 18 U.S.C. §1466 prohibits engaging in the business of selling or transferring obscene matter. 18 U.S.C. §1467 provides for criminal forfeiture in obscenity cases. 18 U.S.C. §1468 prohibits distribution of obscene material by cable or subscription television. 18 U.S.C. §1469 provides a presumption regarding distribution of obscene matter in interstate and foreign commerce. 18 U.S.C. §1470 provides an enhanced penalty for knowing distribution of obscene matter to minors under the age of 16.

¹⁰ 393 U.S. 557 (1969).

¹¹ U.S. Dist. LEXIS 2739 (W.D. Dist. Pa. Jan. 20, 2005).

¹² There are no fundamental speech or privacy rights under *Stanley v. Georgia*, 393 U.S. 557 (1969), or *Lawrence v. Texas*, 539 U.S. 558 (2003), to acquire obscenity that confers a corollary right to acquire or distribute obscenity. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 50 (1973); *United States v. Orito*, 413 U.S. 139, 141-143 (1973); *United*

Lawrence v. Texas.¹³ It is on appeal in the Third Circuit and we expect the decision to be reversed.

The exponential increase of pornographic Web sites is staggering. At the end of 1998, one of the leading software filtering companies had identified 71,831 pornographic Web sites with 14,366,200 pages of pornography. By the end of 2004, the company had identified 2,100,000 pornographic Web sites with 420,000,000 pages of pornography. It is believed that most of these Web sites are owned by fewer than 50 companies. I have personally looked at hundreds of these Web sites. Virtually all of them display hard-core prosecutable material that is easily accessible to children. And children are doing so.

We at Concerned Women for America are heartened at the recent announcement by the Department of Justice of the formation of a multi-agency Obscenity Task Force, with Bruce Taylor as its advisor. The most effective way to prevent more victims of pornography is vigorous and consistent enforcement of federal and state laws. Those who traffic in obscenity deserve to suffer the full punishment the law provides. Our children, grandchildren and their families deserve no less.

States v. 12 200-ft. Reels of Film, 413 U.S. 123, 126-129 (1973); *United States v. Thirty-seven Photographs*, 402 U.S. 363, 376-377 (1972) (opinion of White, J.); *United States v. U.S. v. Reidel*, 402 U.S. 351, 355 (1971). See also *U.S. v. Thomas*, 74 F.3d 701, 710 (6th Cir. 1996), cert. denied, *Thomas v. United States*, 519 U.S. 820 (1996), holding that “the right to possess obscene materials in the privacy of one’s home does not create ‘a correlative right to receive it, transport it, or distribute it’ in interstate commerce even if it is for private use only.” The *Extreme* court apparently confused the limited privacy of the home in *Stanley*, which is the basis of the Court’s ruling, with the fundamental privacy right of the individual, as discussed but not applied in *Lawrence*, which follows a person beyond the home.

¹³ 539 U.S. 558 (2003).