





- 1  **Obscenity**
 - How is it different than indecency?
 - Hicklin Rule 1868
 - Comstock Act 1873

- 2  **Roth v. U.S. 354 U.S. 479 (1957)**
 - Obscenity is expression that is both (1) worthless (utterly without redeeming social importance) and (2) sexually lewd meaning (a) whether to the average person (b) applying contemporary community standards (c) the dominant theme of the material taken as a whole (d) appeals to the prurient interest.

- 3  **Some notable test cases:**
 - *Jacobellis v. Ohio*, 378 U.S. 184 (1964).
 - *Les Amants'* love scene declared not obscene
 - Brennan tried to clarify that community standards meant national standards (but didn't get the full Court's support)
 - Justice Potter Stewart:
 - "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. but I know it when I see it, and the motion picture involved in this case is not that."

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 - *Memoirs v. Mass.*, 383 U.S. 413 (1966).
 - *Fanny Hill* or *Memoirs of a Woman Pleasure* found not obscene.
 - Plurality opinion explained that it was not proven that the work was utterly without redeeming social value (there was some literary merit).
 - Now works needed to be utterly without redeeming social value.
 - This made the Roth test almost impossible to meet

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- Mishkin v. New York 383 U.S. 502 (1966)
 - Although not sexually explicit, several books are ruled obscene
 - Changed the meaning of “average person.”
 - “We adjust the prurient-appeal requirement to social realities by permitting the appeal of the type of material to be assessed in terms of the sexual interests of its intended and probable recipient group.”

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- Ginsberg v. New York, 390 U.S. 629 (1968)
 - Proprietor of a luncheonette sold non-explicit “girlie” magazines to a juvenile.
 - The SCOTUS sustained the conviction, thus allowing NY and other states to have stricter standards for the dissemination of sexual material to minors than adults.
 - Introduced notion of variable obscenity standard.
 - What might not be obscene for an adult may be declared obscene for a minor.

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- Stanley v. Georgia, 394 U.S. 557 (1969)
 - Stanley was convicted for having 8mm “stag” films in his home for his private use.
 - The SCOTUS unanimously overturned the conviction primarily because GA law was an unconstitutional invasion of privacy.
 - However, in later rulings, the Court made clear that the right of possession did not mean there was a right to disseminate explicit materials, even for private use.

8  **Miller v. California, 413 U.S. 15 (1973)**

- Test for obscenity:
 - 1) Whether an average person, applying contemporary community standards of the state or local community, would find that the work 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 lacks serious literary, artistic, political, or scientific value (called the SLAPS test)

9  **Attacks on Art and Culture-SLAPS**

- Skywalker Records, Inc. v. Navarro, 739 F. Supp. 578 (S.D.Fla. 1990), Luke Records, Inc. v. Navarro, F. 2d 134 (11th Cir., 1992).
 - “Call & Response”
- Mapplethorpe- Cincinnati CAC

10  **Pornography**

- What is it?
- How is it different from obscenity?
- What restriction can we/ should we put on pornography?

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- Civil Rights Efforts:
 - Pornography promotes violence against women.
 - Violation of women’s civil rights (14th Amend.)
 - New category of unprotected speech
 - Feminists in opposition
 - MacKinnon/Dworkin approach
 - American Booksellers v. Hudnut, 771 F.2d 323 (7th Cir. 1985)
 - Indianapolis law: graphic sexually explicit images of the insubordination of women and showed them as sexual objects who enjoyed pain, rape, domination, etc. were pornographic. Court found overbroad.
 - Regina v. Butler, 134 Nat’s Rptr 81 (1992)
 - Erotic material harmful to women can be banned.

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- **Zoning Efforts**

- Community cannot under the guise of zoning, completely bar or significantly reduce the number of adult bookstores, movie theatres or newsstands.
- Ordinance must be justified by showing that it furthers a substantial state interest
- Ordinance must be narrowly drawn and not overbroad.
- Has been used to provide buffer around churches and schools. Generally grandfather existing businesses.

13  **Child Pornography**

- **New York v. Ferber, 458 U.S. 747 (1982)**
 - Court upheld a statute banning child pornography which was defined as sexual material involving children as models or actors.
 - The Court found that the state's interest in protecting children from participating in the production of these materials was strong enough to justify banning the materials themselves, so as to dry up the market.

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- **Osborne v. Ohio, 495 U.S. 103 (1990)**
 - Court found this interest in children was strong enough to justify a ban on private possession of child pornography, even though obscenity is not enough to justify intrusion into the home (Stanley) The difference, the Court said is that child pornography laws are designed to protect the children who are exploited by the production of these materials, while obscenity laws rely on a paternalistic interest in protecting the readers morals.

15  **Protecting Children**

- **Communications Decency Act 1996 (CDA)**
 - Illegal to put "indecent" content on Internet where kids could access it. SCOTUS (1997) said unconstitutional - broad suppression of speech and "indecent" was too vague.

- Child Online Protection Act 1998 (COPA)
 - Second attempt. Narrower. Required commercial Web sites to verify age before giving access. Again unconstitutional as there may be less restrictive means (filters?)

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- Children Internet Protection Act 2000 (CIPA)
 - Required schools and libraries receiving federal tech funds to install filters on computers. ALA challenged library portion and lost. Schools have not challenged.
- Child Pornography Prevention Act 1996 (2002)
 - Bars the sale and distribution of any images that “appear” to depict minors performing sexually explicit acts.
 - Lolita
 - American Beauty
 - Included actual images, but also digital images.
 - Anime
 - How does this connect to the original rationale for protecting children (Osborne and Ferber case reasoning)?
- Brian Dalton