Obscenity

Introductory Comments

In addition to incitement to unlawful action and defamation, another category of unprotected speech is obscenity.

Under the governing standard in *Miller v. California* (Burger 1973), the **production, distribution, and sale** of **sexually oriented material** may be prohibited as obscenity if the material meets a **three-part test**.

Rule: The material must **describe or depict sexual conduct** that, **taken as a whole** by the **average person**: (1) appeals to the **prurient interest in sex**, using **community** standards; (2) is **patently offensive**, using **community** standards; and (3) lacks **serious value** of a **literary, artistic, political, or scientific nature** (LAPS), using a **national reasonable person** standard.

- **Taken as a whole**: considering the entire work, not just a passage or depiction taken out of context

- **Prurient interest**: tending to incite lustful or lascivious thoughts or appealing to an obsessive interest in sex, as those concepts would be understood by the average community member

- **Patently offensive**: a mere description or depiction of sex is inadequate; the material must be objectively off-putting to the average community member

Minors: When sexually oriented materials are produced for minors or sold to minors, the three-part obscenity test is **retooled to apply to minors**. Thus, material can be prohibited as obscenity for minors if it appeals to the prurient interest of minors, is patently offensive to minors, or lacks serious value for minors. Of course, adults cannot be prevented under such laws from viewing sexually oriented materials that would be obscene only for minors.

For example, recently the Supreme Court recognized the power of Congress to require public libraries that receive federal money for Internet services to install filtering software that will block access by minors to visual depictions that may be obscene or indecent as to them. The Court upheld the law, in part, because it interpreted it to require a library, at the request of adults, to unblock those sites that would not obscene as to them.

Child pornography has assumed a special place in the obscenity doctrine. The **production, distribution, sale, and possession** of materials depicting **actual minors engaging in sexual activities** can be **completely banned**, whether or not it would be found obscene under the *Miller* three-part test.

The case is different for **"virtual" child pornography**: material that uses **computer-generated images** rather than photos of real children. The creation, distribution, sale, or possession of such

imagery is to be evaluated under the *Miller* three-pronged test. But the Supreme Court has held that the distribution and sale of virtual child pornography can be penalized **if it were advertised as real child pornography**. Such lurid and misleading advertising is **unprotected under the doctrine of "pandering."**

Before the Internet, the industry of adult bookstores and movie theaters featuring pornography was once the source of much constitutional litigation. Even if such establishments display only non-obscene sexual materials, they can still be subject to appropriate **zoning ordinances**. The location of such bookstores and theaters may be regulated, provided that all such entertainment is not entirely zoned out of the community. But recall that **nude dancing** in adult entertainment parlors and in bars **can be prohibited entirely**, as long as the regulations ban all forms of public nudity and, thus, are **viewpoint-neutral**.