

Obscenity and Indecency

- For the most part, the rules of both of these, and when these materials can be disseminated, deal with the dissemination of sexually explicit materials.
- Such sexually suggestive or explicit materials can be generally split into three categories:
 - Obscenity: This category is so offensive that it deserves and receives no First Amendment protection.
 - It can be regulated or outlawed at the will of the states.
 - Indecency: This category is “less offensive” than obscenity. It enjoys First Amendment protection. However, it may be regulated more than political speech .
 - e.g., to protect children from indecent images, etc.
 - Speech that doesn’t rise to the indecency level enjoys full First Amendment protection.

Obscenity

- Basic rules:
 - Obscenity is not protected by the Constitution.
 - Distribution of obscene materials may be outlawed and punished.
 - Distribution of obscene materials by media outlets is banned.
- What is obscene?
 - (or, “I can’t define it, but I know it when I see it” – Justice P. Stewart)
- To be considered obscene requires three elements:
 - The material appeals to prurient interest;
 - The material is “patently offensive” in the community; and
 - The material lacks redeeming social value.

Prurient Interest

- The material must appeal to “lascivious, shameful or morbid” interest in sex.
 - The standard by which this is measured is that of the “average person.”
 - This does NOT mean that the average person has to find it sexually appealing. Pornography can also be aimed at a percentage of the market.
 - For “atypical” sexual depictions, the standard is based on the people to whom the images are targeted.
 - This is measured based on a “community” standard.
 - What an average person in Las Vegas considers obscene is not necessarily the same as what the average person in Salt Lake City does.
 - Because of this rule, wide distributors of these materials may be subjected to the rules of the most stringent jurisdiction.

Protection of Children

- Where children are likely to see the disseminated materials, the standard is set much lower for a finding of obscenity.
- Child pornography is inherently considered obscene, even if it doesn't meet the other parts of the definition.
- The standard for defining what prurient interest means, with regard to depictions of children, is much lower than for equivalent depictions of adults.
 - Disseminators of pornographic materials are required to keep records that prove their subjects are adults.
- However, some federal regulations regarding child pornography have been reversed as overbroad or too vague.

Patently Offensive

- Sexually stimulating materials are not inherently obscene. It must go beyond that to the point of offensiveness.
 - Again, this is measured based on the community standard.
 - This generally requires something more than mere nudity.
 - Deviant or strange conduct can help something be considered offensive.
 - Curse words, in and of themselves, are not considered patently offensive, though they may, of course, be regulated in broadcast media.

Lack of Redeeming Social Value

- Redeeming social value could be that the work has usefulness from the standpoint of:
 - Science
 - Medicine
 - Art
- The work must be looked at as a whole when determining whether it has value.
 - e.g., one can't look at a few isolated pages of a full length novel and say the whole novel is obscene.

Privacy Issues and Prior Restraint

- Possession of obscenity can be, and is often, criminalized.
 - This can also include sending or ordering it through the mail.
- Entrapment of people to order obscene materials can lead to a successful defense of entrapment.
- Possessing obscene material on one's own home has been held to be protected by privacy laws.
 - However, this can be eviscerated by laws that make it illegal to acquire, transport, distribute etc. the materials.
 - Whatever right to privacy exists does not extend to theaters, even if privately owned and open only to adults.
- Like all First Amendment issues, prior restraint is very hard to come by.
 - The government agencies can pre-screen certain media disseminations of questionable materials, but this process is laden with protections.

Indecency

- This includes sexually explicit material that, for whatever reason, does not meet the definition of obscenity.
- The courts have rules that the FCC can regulate indecency in broadcast television, and the FCC does so, often punishing broadcasters for airing indecent material. The regulation includes:
 - Limiting sexual material to certain times of the day.
 - Not allowing curse words on the air.
 - 2001 FCC guidelines provide that a broadcast is indecent if it:
 - Describes sexual or excretory organs or activities; and
 - It is patently offensive to the average viewer or listener.
 - This is a case by case determination.
 - The FCC has gotten more strict with isolated references recently and has increased the fines and punishments levied.

Indecency Through Different Media

- Broadcast TV
 - The FCC has total control and indecency is often limited by time or prohibited all together (see above).
- Telephone
 - Indecent content that does not rise to the level of obscenity (e.g., “dial-a-porn” phone numbers cannot be banned, but can be regulated.
 - The law can (and does) ban phone content that is “obscene.”
- Cable TV
 - Cable TV essentially enjoys the same freedom newspapers do.
 - Obscenity can be banned but adult access to indecency cannot.
 - Some rules to protect children are okay but not if too broad.

The Internet

- The Supreme Court struck down a federal law that tried to prevent indecent materials from being disseminated over the net. The Court ruled websites enjoy the same protections as the print media (and cable TV).
 - The Court rejected the comparison of the net to over-the-air TV.
- A later federal law prohibiting material “harmful to minors” also was struck down as being vague and overbroad.
- Public libraries (that accept public funding) can be required to filter out indecent material if they allow internet access to children.
 - Adults may ask the librarian to disable the filter for them.
 - “The Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment”

Violence in the Media

- Violent songs and video cannot qualify as obscene without sexual content. Although, like indecency, it can be regulated in its distribution through the media.
- Violent pornography can be banned if it meets the definition of obscenity.
 - However, efforts to ban violent pornography all together have failed as they are overbroad or too vague when trying to enact a blanket ban.
 - A law to ban violent sexual abuse against women also failed for similar First Amendment reasons.

The V-chip

- Although violence and pornography cannot be banned and can only be regulated to a point, federal law requires TV shows to be rated so as to allow parents to keep offensive content off their TV by use of the V-chip.
- Both Cable and broadcast TV participate in the ratings system and parents can program their TVs to block shows that meet certain ratings.
- Ratings for children's shows:
 - TV-Y: appropriate for young children
 - TV-Y7: directed to children 7 years old and over
 - TV-Y7-FV: may not be appropriate for children under 7

V-Chip (cont.)

- Ratings for general shows:
 - TV-G: general audiences
 - TV-PG: parental guidance suggested
 - TV-14: material may be unsuitable for children under 14
 - TV-MA: mature; material may be unsuitable for children under 17
- In addition, shows rated PG or higher may have one letter codes, explaining why it is rated, including:
 - V (violence)
 - S (sexual scenes of innuendo)
 - L (language)
 - D (suggestive dialogue)

Zoning Laws in Controlling Sexual Expression

- Although indecency peddling stores and shops cannot be banned unless obscene, they can be restricted to geographical areas.
 - The regulation has to meet the general rules for “content neutral” and “time, place and manner” restrictions.
 - Therefore, the law must leave room open for the expression, as long as the expression is not obscene.
- Some content neutral laws, like bans on public nudity, may be allowed, even if they don’t provide alternative allowances.
 - Once again, however, the law may not be too broad.

Other Ways of Controlling Sexual Expression

- Postal laws allowing homeowners to restrict their receipt of indecent material are allowed.
- Laws that restrict display of indecent materials to where minors can't see them are allowed.
- The government may not informally pressure people to stop peddling such material if it could not be banned.
- The Supreme Court allowed the cutting of funding to “art” that is sexually explicit.
 - Though, lower federal courts have, in some cases, restricted the cutting off of funding based on content.

Private Regulation of Sexual Content

- Some industries police themselves in terms of voluntary rating systems:
 - The MPAA rates movies as G, PG, PG-13 R or NC-17
 - Music (RIAA)
 - Video games (ESRB)
 - Various ISPs and
 - These are a privately run systems. The law does not enforce them.
- The federal government has been reluctant to step into this area because the industries can do a better job of policing themselves.
- Citizens' groups often pressure media outlets about objectionable content as well.