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To: Georgi Burjanadze
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RE: Select Free Speech Questions

Questions Presented

1. What state and federal criminal obscenity statutes are generally upheld in accordance with the right to free speech and how does that language compare to language in the Constitution of Georgia and Georgia's obscenity statute?
2. Do the words in Article 255, Section 1 of the Criminal Procedure Code of Georgia violate U.S. vagueness principles or Article 42 of the Constitution of Georgia which states that any crime must be clearly defined in the criminal law?
3. How is obscenity treated when distributed from varying platforms (ex: Television, Radio, Internet, Print, etc.)?
4. How is child pornography different from other pornography?

Circumstances of the Georgia Case

A citizen of Georgia ("Applicant") was charged on April 28, 2015 for illicit distribution of pornographic piece or image under, "Article 255. Illicit Production or Sale of Pornographic Piece or Other Object." The statute reads:

> 1. Illicit production, distribution, or promotion of a pornographic piece, printed material, image or other object pornographic in character, as well as trafficking of such object or its keeping intended to sell or distribute it, shall be punishable by fine or by corrective labour for up to two years or by deprivation of liberty for up to same term.

The Applicant has appealed the charges claiming the above-cited law is unconstitutional and contradicts the free speech clause of the Constitution of Georgia. The Applicant would like to know how Article 255 compares to U.S. law concerning obscenity and, more specifically, pornography.

Answer

1. **What state and federal criminal obscenity statutes are generally upheld in accordance with the right to free speech and how does that language compare to language in the Constitution of Georgia and Georgia's obscenity statute?**

Congress has not statutorily defined pornography. However, the courts have long held that the First Amendment does not protect obscene speech—sexually explicit material that violates fundamental notions of decency.[1] *United States v. Williams*, 553 U.S. 285, 288 (2008). Over the years, the courts have refined the boundaries of obscenity and in a landmark case a majority of Supreme Court Justices agreed on a framework for Congress to work within when creating laws concerning obscenity. *Miller v. California*, 413 U.S. 15, 21 (1973).

A. An obscenity statute will be upheld as constitutional if it complies with Miller.

Obscenity statutes that comply with the *Miller* test are likely to be upheld as constitutionally valid because the statutes do not violate the overbreadth doctrine. The overbreadth doctrine prohibits the government from banning unprotected speech if a substantial amount of protected speech is also prohibited or chilled in the process. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002). In *Miller*, the Court defined material as "obscene" if, (a) the dominant theme of the material, taken as a whole, appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Miller*, 413 U.S. at 24. Applicable state law, as written or authoritatively construed, must specifically define obscene sexual conduct. *Id.* This is because state statutes designed to regulate obscene materials must be carefully limited. *Id.* at 23-24.

i. <u>The dominant theme of the material taken as a whole appeals to a prurient interest in sex.</u>

[1]Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. Const. amend. I.

In *Vernon Beigay*, a video storeowner was cautioned by local law enforcement to discontinue the sale or distribution of materials violative of the state's obscenity statutes. *Vernon Beigay, Inc. v. Traxler*, 790 F.2d 1088, 1090 (4th Cir. 1986). The South Carolina obscenity statute reads, in part, "(B) For purposes of this article any material is obscene if: . . . (2) the average person applying contemporary community standards relating to the depiction or description of sexual conduct would find that the material taken as a whole appeals to the prurient interest in sex . . . ." S.C. Code Ann. § 16-15-305. "Prurient interest" means a shameful or morbid interest in nudity, sex or excretion and is reflective of an arousal of lewd and lascivious desires and thoughts. *Vernon Beigay, Inc.*, 790 F.2d at 1093. The storeowner brought suit challenging the constitutionality of the South Carolina obscenity statutes. *Id.* at 1091.

The Fourth Circuit held the South Carolina obscenity statute constitutionally valid because the section defining prurient interest requiring both a morbid interest and reflection of arousal places a more stringent standard on the prosecution than required by *Miller*. *Id.* at 1093–94. Additionally, the Fourth Circuit noted that the Supreme Court has recognized the terms "lewd" and "lascivious" as proper definitions for "prurient interest." *Id.* at 1094 (citing *Roth v. United States*, 354 U.S. 476, 487 (1957)).

While the words "lewd" and "lascivious" used to define "prurient interest" have been held constitutional, the word "lust" has been held unconstitutional because it conflicts with society's understanding of normal sexual interests. The Supreme Court reversed the Ninth Circuit's decision to strike down a Washington State statute that defined "prurient" as "that which incites lasciviousness or lust." *Brockett v. Spokane Arcades, Inc*., 472 U.S. 491, 506 (1985). The word "prurient," as used in the state statute, was defined in the statute as "that which incites lasciviousness or lust." *Id.* at 494. The Ninth Circuit concluded, and the Supreme Court

agreed, that inclusion of the word "lust" went beyond the intention of the *Miller* test, since the contemporary understanding of that word was no more than "sexual desire." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499 (1985). However, the Supreme Court ruled the statute constitutionally valid otherwise. *Id.* at 504–05.

ii. Material is patently offensive if it affronts contemporary community standards relating to the description or representation of sexual matters.

If the "community" in community standard were based on only the most susceptible and easily offended people of society, then material that is not obscene to a "normal" individual would be deemed obscene and to violate the law. Such a standard would unconstitutionally violate the freedoms of speech. *Roth v. United States*, 354 U.S. 476, 491 (1957). As a result, the "community" in community standard is not limited to a subset of people. It includes all individuals within a definable boundary. *Id.* at 488–89.

The exact words "contemporary community standards" need not be used in the statute, but the Constitution requires at a minimum that obscene material be judged by a community standard. *State v. Russland Enterprises*, 555 So. 2d 1365, 1368 (La. 1990). It may be stated in general terms or defined geographically. *Id.* However, even the Supreme Court of the United States has not definitively declared when to apply a nation-wide community standard as opposed to a state-wide community standard.

a. A Nation-Wide Community Standard Generally Applies when a Federal Anti-Obscenity Law was Violated

When the statute violated is a federal anti-obscenity statute, a nation-wide community standard of decency applies. *United States v. Palladino*, 490 F.2d 499, 502 (5th Cir. 1974). In *US v. Palladino*, the Court addressed multiple defendants' cases at one time. Each had been charged with violating a federal statute prohibiting use of the mails to convey obscene material. *Id*. The statute allowed for prosecution in either the state of mailing, the state of delivery, or a state the

material passed through. *Id.* at 503. Allowing a state standard of decency to apply meant that "senders of identical materials from the same state [could be] found guilty or not, depending on the course of transit or state of delivery of their material." *Id.*

However, in *Ashcroft v. ACLU*,[2] the Supreme Court did apply a state-wide community standard even though the challenged anti-obscenity statute was a federal statute. The Court determined that an entity distributing material across the nation can be subject to the community standards of each individual state to which it distributes. *Ashcroft v. Am. Civil. Lib. Union*, 535 U.S. 564, 575 (2002). The Court stated that "[i]f a publisher chooses to send its material into a particular community, this Court's jurisprudence teaches that it is the publisher's responsibility to abide by that community's standards. The publisher's burden does not change simply because it decides to distribute its material to every community in the Nation." *Id.* at 583.

b. A State-Wide Community Standard Generally Applies when a State Anti-Obscenity Law was Violated

The Supreme Court has generally applied a state-wide community standard when the violated law was a state anti-obscenity law. In *Miller v. California*, the Supreme Court of the United States endorsed use of a state-wide community standard where the defendant had violated

[2]In *Ashcroft*, a group of plaintiffs challenged the constitutionality of the Child Online Protection Act (COPA) before it went into effect. The lower court determined that COPA was unconstitutionally broad because it used less than a nation-wide standard in determining what is obscene on the internet because web publishers cannot control the geographic scope of publication.

The Court discussed its prior holdings in *Hamling v. US*, 418 U.S. 87 (1974) and *Sable Comm. of Cal., Inc. v. FCC*, 492 U.S. 115 (1989). In *Hamling*, the Court applied a state-wide community standard (rather than a national standard) to determine whether the defendant had violated a federal statute prohibiting the mailing of obscene material. In his dissent, Justice Brennan claimed that applying a community standard would lead to self-censorship in abridgement of First Amendment rights because national distributors who choose to send their product into many states "would be forced to cope with the community standards of every hamlet into which their goods might wander." *Id.* at 144.

In *Sable*, the Court upheld the use of a state-wide community standard (rather than a national standard) when determining whether a defendant has violated a federal statute. In that case, a "dial-a-porn" company brought action challenging a new federal statute that prohibited the use of telephones to make obscene or indecent communications for commercial purposes. *Sable Comm. of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 120 (1989). The Court stated that "[t]here is no constitutional barrier under *Miller* to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others. If Sable's audience is comprised of different communities with different local standards, Sable ultimately bears the burden of complying with the prohibition on obscene messages." *Id.* at 125–26.

a California statute by distributing obscene material through the mail. The Court said that it is unrealistic and constitutionally unsound to "read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." *Miller*, 413 U.S. at 32. The variety of tastes and attitudes amongst the states should not be "strangled by the absolutism of imposed uniformity." *Id.* at 33.

iii. Material is utterly without redeeming social value if it lacks serious artistic, scientific, literary or political value.

In *Miller*, the Court was careful to point out that the First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. *Miller*, 413 U.S. at 34. Although "community standards" are used to evaluate the first two prongs of the Miller test, see *Smith v. United States*, 431 U.S. 291, 301 (1977), the proper inquiry for the last prong of the *Miller* test is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but rather, whether a reasonable person would find such value in the material, taken as a whole. *Pope v. Illinois*, 481 U.S. 497, 500–01 (1987).

In *Luke Records*, the trial court found the defendant record company guilty of violating state obscenity law for producing the musical recording "As Nasty As They Wanna Be." *Luke Records, Inc. v. Navarro*, 960 F.2d 134, 135 (11th Cir. 1992). The trial court based its ruling on the court's knowledge of obscenity within its community and ruled, by simply listening to the musical work, that it had no serious artistic value. *Id.* at 137. In doing so, the court failed to apply the reasonable person standard established in *Pope* because the defendant presented expert testimony that the work had serious artistic value and the state presented no evidence to the contrary. *Id.* at 139. The appellate court reversed the finding of the trial court because the record

was insufficient to assume the fact finder's artistic or literary knowledge or skills to satisfy the last prong of the *Miller* analysis, which requires determination of whether a work "lacks serious artistic, scientific, literary or political value." *Id.* at 138.

B. Language contained in the Georgian Constitution and Georgian obscenity statute appears to violate established U.S. law.

Georgia's constitutional provision on freedom of speech[3] is strikingly similar to the First Amendment of the United States' constitutional provision on freedom of speech. However, the Supreme Court of the United States has made it clear that, while the freedom of speech is generally protected, there are exceptions. The Court has emphasized repeatedly that, where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is substantial and real, judged in relation to the statute's plainly legitimate sweep. *Virginia v. Black*, 538 U.S. 343, 375 (2003).

Georgia has not defined the term "pornography" in its criminal code. In the United States, that approach would be deemed unconstitutional because, although "obscenity" is not protected by the First Amendment, criminal statutes must include specific definitional requirements. In contrast, Article 255 holds that all pornographic materials violate Georgia law.[4] Without an explicit definition within the statute, it seems the statute would be rejected under the United States' overbreadth doctrine. The Georgia law on pornographic material is essentially where the United States law on obscenity was prior to the development of the *Miller* test—failing to

[3] "Everyone has the right to freely receive and impart information, to express and impart his/her opinion orally, in writing or by in any other means. 2. Mass media shall be free. The censorship shall be impermissible. 3. Neither the state nor particular individuals shall have the right to monopolise mass media or means of dissemination of information." Georgia Const., Ch. 2, Art. 24.

[4] "Illicit production, distribution, or promotion of a pornographic piece, printed material, image or other object pornographic in character, as well as trafficking of such object or its keeping intended to sell or distribute it, shall be punishable by fine or by corrective labour for up to two years or by deprivation of liberty for up to same term." Article 255, Section 1, Crim. Pro. Code of Georgia.

differentiate between sexual material protected by Freedom of Speech and material that is not protected.

2. **Do the words in Article 255, Section 1 of the Criminal Procedure Code of Georgia violate U.S. vagueness principles or Article 42 of the Constitution of Georgia which states that any crime must be clearly defined in the criminal law?**

Article 45, clause 5 of the Constitution of Georgia has been interpreted in cases to provide that the broad construction of the Criminal Law is detrimental to an individual. In addition, it requires that a court construe a legal norm so that an individual would be clear as to which actions or failures will cause criminal liability. When words used in statutes have multiple meanings, they must be defined in the statute so that persons of ordinary intelligence understand their meaning and officials who charge and prosecute crimes do not do so arbitrarily. Clear definitions of words and phrases will not offend the vagueness doctrine.

Under the U.S. vagueness doctrine, a statute must be stated explicitly so that a person of ordinary intelligence may understand its meaning and so that authorities will not differ in the statutes application. Vagueness may be created when terms used in multiple sections of a statute are not defined. *Reno v. ACLU*, 521 U.S. 844, 871 (1997). Permissible vagueness in a statute is held to a strict standard where free expression is concerned. *NAACP v. Button*, 371 U.S. 415, 432 (1963). Specificity is required when statutes address freedoms enumerated in the First Amendment. *Id.* at 433.

The vagueness doctrine comes from the Due Process Clause of the Fifth Amendment. *United States v. Williams*, 553 U.S. 285, 304 (2008). The Due Process Clause may be satisfied when individuals receive fair notice of what is prohibited by a statute and those authorities applying the statutes do not do so arbitrarily because the meaning of the terms in the statute are unclear. *State v. Villegas*, 2012 R.I. Super. LEXIS 159, *6 (R.I. Super. Ct. 2012). The Supreme Court has struck down statutes that tied culpability to subjective words such as “annoying” or

"indecent" because there was no statutory definition, narrow context, or conclusive legal meaning. *Williams*, 553 U.S. at 306. When a statute is written to regulate a First Amendment freedom, such as free speech, courts apply a strict scrutiny standard. See generally *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000). This standard requires that a statute must be narrowly tailored to meet a compelling governmental interest. Additionally, if a less restrictive means of regulation would serve the compelling governmental interest, then that means must be used. *Id.* at 806.

In *State v. Villegas*, the defendant was charged with several violations of Rhode Island General Laws for placing hidden video cameras in his fifteen year-old step-daughter's bathroom and bedroom and filming her. *State v. Villegas,* 2012 R.I. Super. LEXIS 159, *2 (R.I. Super. Ct. 2012). The statute defined "sexually explicit conduct" as "graphic or lascivious exhibition of . . . ." *Id.* at *8. The defendant argued that the word "graphic" is unconstitutionally vague. *Id.* at *6.

The court decided that the ordinary meaning of "graphic" provided sufficient guidance to a person of ordinary intelligence to know what they can and cannot do, even though the statute gave a somewhat circular definition of "graphic" and "sexually explicit conduct". *Id.* at *9. The court also decided that the word "graphic" did not "authorize or encourage seriously discriminatory enforcement" and that the defendant failed to prove that the word "graphic" would mean that harsh and discriminatory enforcement would occur because of it. *Id.* at *11–12. Finally, the Superior Court of Rhode Island decided that the term "graphic" did not unduly inhibit First Amendment freedoms. This is because, while the freedom of speech is protected, child pornography is not. *Id.* at *13. Therefore, the use of the word "graphic" is not unconstitutionally vague in the statute. *Id.* at *14.

Vague laws do not provide fair warning of the difference between lawful and unlawful conduct. *American Booksellers Asso. v. Hudnut,* 598 F. Supp. 1316, 1338 (S.D. Ind. 1984). The plaintiffs in *American Booksellers Association v. Hudnut* were a group of trade associations, non-profit organizations, and book distributors, all with national and local interests. They filed suit against the City of Indianapolis to enjoin enforcement of, and declare unconstitutional, a city ordinance which outlawed pornography. The ordinance defined pornography as depicting sexually explicit subordination of women, which the city called sex discrimination. The plaintiffs had five contentions in support of their claim for relief: (1) the ordinance restricted the availability, display, and distribution of protected, non-obscene material; (2) the ordinance violates the precedent established by the Supreme Court that preclude the banning of speech that is socially or politically offensive to the majority; 3) the ordinance is unconstitutionally vague for the residents of Indianapolis and has a chilling effect on free speech; 4) the ordinance provides for cease and desist orders which act as a prior restraint on material; 5) the ordinance violates the Commerce Clause of the Constitution. *See id.* at 1327–1328. The defendants admitted that the ordinance goes beyond regulating obscene material but denied all other allegations. *Id.* at 1328.

The United States District Court for the Southern District of Indiana, Indianapolis Division understood the aim that the legislature had in attempting to protect its citizens from harm. However, the court's duty was to assess the constitutionality of the ordinance that the legislature enacted, not to define the community standards. *Id.* at 1327. Laws must provide explicit standards if enforcement by police, judges and juries is to be objective rather than subjective. *Id.* at 1338. A statute that attempts to regulate in the area of a First Amendment freedom must have clear boundaries so that vagueness does not confuse the understanding of the citizens to whom the freedoms apply. *Id.*

The Indiana court found multiple words and/or phrases, such as pornography, subordination of women, degradation, abasement, and inferior, to be vague because they were not specifically defined. *Id.* at 1338–1339. Because the definitions of these terms is arguable, people of, "ordinary intelligence would not be on notice as to what acts are proscribed." *Id.* at 1339. The court held in part that this vagueness runs afoul of the Fifth Amendment due process rule, therefore the ordinance using these terms is unconstitutional. *Id.* The court does not find that the interest the defendant states is the reason the ordinance is so fundamental as to be a compelling interest which meets the standard of strict scrutiny. *Id.* at 1336.

Another example of a vague statute was the Communications Decency Act of 1996 (CDA) which was challenged in 1996. *ACLU v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa.1996). Judge Buckwalter granted a temporary restraining order, momentarily keeping the CDA from being enforced, because its "indecency provision" was unconstitutionally vague. *Id.* at 827. The plaintiffs in the case contended that the challenged provisions, which are directed at internet communications that are "indecent" or "patently offensive" for persons under age eighteen, infringe upon rights protected by the First Amendment and the Due Process Clause of the Fifth Amendment. *Id.*

The CDA was found to be unconstitutional on its face. *Id.* at 883. Chief Judge Sloviter determined that the CDA was not drafted with language that made its limitations clear and that Congress intended to reach more people than just those commercial pornographers it supposedly targeted. *Id.* at 855. Because Congress had been clear about this aspect in provisions relating to dial-a-porn services, it was clear that Congress knew how to make itself clear and had not done so in this case. *Id.* The Chief Judge reminds us that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally

presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Id.* at 850. Section 223(a) of the CDA uses "indecent" and § 223(d) uses "patently offensive" in a way that appears interchangeable, the court had to determine whether the drafters have been clear about the meaning of the words so that the statute may be understood by those to whom it may apply because they are criminal provisions. *Id.*

In another example of the vagueness doctrine as applied in the context of criminal prosecution for possession or distribution of obscenity, Article 255, Section 1 of the Criminal Procedure Code of Georgia makes use of several words that are not explicitly defined in the statute. The words "illicit" and "pornographic," and the phrase "pornographic in character" can likely be challenged for vagueness because similar words in U.S. statutes have been challenged. These words can be used in multiple contexts and do not have a simple, ordinary meaning such that a person of ordinary intelligence would be clear about what behaviors are allowed or disallowed. The lack of a simple, ordinary meaning means that officials charged with enforcing the provisions could do so arbitrarily as officers might treat the same item differently according to their own thoughts and opinions on the definitions of the words in the statute.

3. How is obscenity treated when distributed from varying platforms?

The Supreme Court of the United States has decided that varying platforms can be treated differently when it comes to free speech. When the government has greater control over the platform, like it does for broadcasting networks, it has greater control over what can and cannot be distributed through that platform. Conversely, when the government has less control over the platform, the Court is less likely to allow the government to control or prohibit protected speech.[5]

[5]For example, the government has less control over the internet and satellite television. Additionally, people have the ability to exclude the internet or satellite channels from their homes.

A. Radio and Television Broadcasting

The government has a lot of control over radio and television broadcasting networks. It reviews and then accepts or declines licenses for broadcasting on its limited frequencies. The Court has determined that the limited number of frequencies means the government can impose additional impediments to the exercise of free speech via broadcasting. Russel L. Weaver, *Speech and Technology*, 110 Penn. St. L. Rev. 703, 707 (Winter 2006). This means that, although radio and television broadcasting networks have First Amendment rights, they are less than that of an individual's right to speak, write, or publish.[6] Broadcasters can be held liable for indecency, which is protected speech in other contexts as it includes speech which does not have any sexual content. Essentially, when analyzing First Amendment rights of broadcasting networks in comparison to the viewers, it is the viewer's right to be free from indecent broadcasts which is paramount. 16B C.J.S. Constitutional Law § 1031 (2015).

In 1948, Congress passed a law stating that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." 18 U.S.C. § 1464 (2015). In 1978, the Supreme Court of the United States held that, under § 1464, the Federal Communications Commission (F.C.C.) could punish a broadcasting network for airing language that was indecent but not obscene. *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978). Pacifica had aired a recording of comedian George Carlin's "Filthy Words" Monologue. In the Monologue, Carlin repeated a string of words

[6]In *Red Lion Broadcasting Co. v. F.C.C.*, the Court held that radio and television broadcasting should be treated differently than print media because there are a limited number of frequencies the government can allocate to those wishing to publish speech via broadcast. The scarcity in frequencies and access meant that the government could impose special obligations on broadcasters. *See* Russel L. Weaver, *Speech and Technology*, 110 Penn. St. L. Rev. 703, 706 (Winter 2006) (discussing *Red Lion Broad. Co. v. F.C.C.*, 89 S.Ct. 1794 (1969)). Unlike broadcasting, satellite television and radio is not subject to the same restriction as it is not under F.C.C. control. As a result, hosts like Howard Stern have left broadcast television for the freedom of satellite television. *Id.* at 707.

[6]Between its enactment in 1927 and its reenactment in 1934, the courts and Federal Radio Commission (FRC) decided that the FRC could not scrutinize every broadcast prior to its release, but could take note of past programing content when deciding whether or not to renew a broadcasting license. *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 734 (1978)

generally thought to be improper for broadcasting, although they are not obscene as the words did not involve sexually explicit references.[7] *Id.* at 730. The Court determined that § 1464 allowed the F.C.C. to regulate more than obscenity when it comes to broadcast media. *Id.* at 741 ("[T]he Commission has long interpreted § 1464 as encompassing more than the obscene. . . . It is unrealistic to assume that Congress intended to impose precisely the same limitations on the dissemination of patently offensive matter by such different means."). Although the Monologue may have been protected in other contexts, "[w]ords that are commonplace in one setting are shocking in another." *Id.* at 747.

The *Pacifica* Court stated that broadcasting had historically received less First Amendment protection because (1) it is uniquely pervasive in American's lives, and (2) broadcast media is uniquely accessible to children. *Id.* at 748–49. The Court determined that a consumer's right to be free from indecent material outweighed the broadcaster's First Amendment right to disseminate such material. People are constantly tuning in or out, rendering warnings before showing indecent material ineffective. The broadcaster's right finds no refuge in arguing that a viewer can simply turn the channel, as the blow of having seen the indecent material has already occurred. Additionally, even young children below reading age are able to understand the material as it does not require higher learning. According to the Court, ease of access for children justifies treating broadcast media differently from other communication methods. *Id.*

Georgia State Law Professor Eric Segall criticized the holding in *Pacifica*, asserting that "[w]e are well past the time when radio and television broadcasters should receive different First Amendment protection than other forms of media." Eric J. Segall, *In the Name of the Children:*

[7]Carlin was "using words to satirize as harmless and essentially silly our attitudes towards those words." *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 730 (1978).

Government Regulation of Indecency on the Radio, Television, and the Internet—Let's Stop the Madness, 47 U. Louisville L. Rev. 697, 712 (Summer 2009). Satellite and cable television providers, as well as the internet, are as present in homes today as broadcast television. *Id.* at 719. In response to arguments that lifting the heightened restrictions on broadcasters would lead to increased showing of explicit or violent material, Segall asserts that market forces and consumer protest would counteract such a result. *Id.* at 712.

Despite criticism of the case, University of Miami School of Law Professor Lili Levi believes that the cases since *Pacifica* indicate that the Court is unlikely to remove the increased First Amendment restrictions from broadcasting. Lili Levi, *"Smut and Nothing But": The FCC, Indecency, and Regulatory Transformations in the Shadows*, 65 Admin. L. Rev. 509, 512 (Summer 2013). She noted that, in *F.C.C. v. Fox Television Stations, Inc*., the Court failed to take the opportunity to readdress broadcasters' First Amendment status. Instead, it opted to absolve the petitioners from liability for indecency based on narrow due process grounds under the Administrative Procedure Act.[8]

In sum, the government has greater control over the content of broadcast media for a variety of reasons. There are fewer "channels" in broadcast media, it is easy for children to access, and it is everywhere in people's lives. Although other methods of getting a message out are now as pervasive and arguably are as easy for children to access as radio and television broadcasting, the Court has only allowed the government greater control when it comes to radio and television broadcasting.

[8]Fox Television Stations, Inc. aired isolated utterances of obscene words during a broadcast while ABC Television Network aired the nude buttocks of an adult female for seven seconds and the side of her breast for a moment. *F.C.C. v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2309 (2012). The FCC had previously distinguished between isolated instances of profane language and repeated broadcasts of indecent material. After the incidents the FCC altered its position, declaring that fleeting expletives could be actionable. It then issued Notices of Liability to Fox and ABC. *Id.* at 2309. The Court held that "[b]ecause the Commission failed to give Fox or ABC fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionably indecent, the Commission's standards as applied to these broadcasts were vague." *Id.* at 2320.

B. Internet and Satellite Broadcasting[9]

According to Russel Weaver, a Louis D. Brandies School of Law Professor, the government has a significant interest in regulating the internet in order to protect children from accessing indecent material. However, unlike with radio or television, the material cannot be cordoned off to late night showings where children are less likely to stumble upon it. The internet does provide its own barriers though, like effective warnings that pornography will be shown at the next click, or settings allowing parents to block certain content. Russel Weaver, *Speech and Technology*, at 703.

In 1997, the Court struck down provisions of the Communications Decency Act (CDA) which sought to protect minors from indecent material on the internet.[10] *Reno v. ACLU*, 521 U.S. 844 (1997). Section 223(a) of the CDA criminalized the knowing transmission of "obscene or indecent" material to minors. Section 223(d) of the CDA criminalized knowingly sending or displaying to a minor a message that is "patently offensive as measured by contemporary community standards." *Id.* at 859–60.

The Court compared the internet to broadcasting networks in order to decide whether the internet should also have less First Amendment protection for indecent communications. It noted that broadcasting is subject to more restrictions on free speech because of three factors: (1) a history of extensive government regulation, (2) scarcity of broadcasting channels, and (3) the

[9]It is also apparent that the same *Miller* standard applies to printed materials as *Miller* involved a defendant who was charged with mailing obscene printed material. The *Miller* standard has since been used in cases where defendants were charged with printing obscene material. *See generally Pope v. Illinois*, 481 U.S. 497 (1987) (using *Miller* standard to determine whether an attendant at an adult bookstore sold obscene printed material).

[10]The term "indecent" was also vague and so, the Court struck it from the Act in order to save the statute as a whole. Reno v. ACLU, 521 U.S. 844, 871 (1997).

invasiveness of broadcast television and radio.[11] *Id.* at 868. The internet is not regulated as much as broadcasting and provides essentially unlimited "channels" with which to communicate. Importantly, the internet also requires affirmative steps to get to indecent material so that it is relatively difficult for a child to unwittingly stumble onto a pornographic site. *Id.* Although protecting children from harmful material is a government interest, "that interest does not justify an unnecessarily broad suppression of speech addressed to adults." *Id.* at 875.

4. How is child pornography different from other pornography?

Child pornography[12] is treated differently than ordinary pornography. This is because child pornography involves and affects children to a degree that pornography featuring adults does not. As a result, child pornography is not constitutionally protected and is not analyzed under the *Miller* obscenity test. If a real child is depicted in a sexually explicit manner, then the depiction is not allowed. However, if a virtual/digital child is used, then the depiction is only subject to the *Miller* test for obscenity as it could be constitutionally protected speech.

A. Child Pornography vs. Obscenity

Child pornography, which is a form of child sexual exploitation, is not protected by the First Amendment. *See New York v. Ferber*, 458 U.S. 747 (1982) (holding "child pornography is not entitled to First Amendment protection provided the conduct to be prohibited is adequately

[11]The Court in *Pacifica* recognized two important reasons for treating broadcasting differently although it acknowledged that "[t]he reasons for these distinctions are complex" and only two of those reasons were relevant to *Pacifica*'s decision. *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 748 (1978).

[11]The defendants were charged with sending: a single page advertisement depicting "two photographs of naked men, standing and kneeling" but not touching; and books entitled "A Report on Denmark's Legalized Pornography," "Scandinavian Pornography," "Animals as Sex Partners," and "Sex Tools for Erotic Pleasure," "Anal and Oral Love," and "Photographic Deck of Sexual Love."

[12]"[T]he legal definition of sexually explicit does not require that an image depict a child engaging in sexual activity. A picture of a naked child may constitute illegal child pornography if it is sufficiently sexually suggestive. Additionally, the age of consent for sexual activity in a given state is irrelevant; any depiction of a minor under 18 years of age engaging in sexually explicit conduct is illegal." Citizen's Guide to U.S. Federal Law on Child Pornography, The United States Department of Justice, http://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-child-pornography (last visited July 6, 2015).

defined by applicable state law, as written or authoritatively construed"); *Osborne v. Ohio*, 495 U.S. 103 (1990) (holding it was a crime for an adult to possess child pornography in his or her home). As a result, the standards for prosecuting child pornography are different than the standards for obscenity. *New York v. Ferber*, 458 U.S. 747, 764-65 (1982), held that "the test for child pornography is separate from the obscenity standard enunciated in *Miller*."[13]

The Court in *Ferber* did not believe the *Miller* test "reflect[ed] the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children." *Id.* at 761. Therefore, "the question under the *Miller* test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work." *Id.* Thus, it is clear from the *Ferber* decision that child pornography is treated as more harmful to society than "traditional pornography" or obscenity, likely based on the potential harm to children.

The Supreme Court explicitly explained the rational for the differing standards when it stated:

> The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled. *Id.* at 759.

B. Depictions of Virtual Children

In *Ashcroft*, the Supreme Court distinguished *New York v. Ferber*, because the CPPA "ban[ned] possession of . . . a sexually explicit film that contains no youthful actors but has been

[13]As described above, the *Miller* test for obscenity is "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973).

packaged to suggest a prohibited movie." *Ashcroft v. Free Speech Coal*., 535 U.S. 234, 238 (2002). Thus, the key distinction between the two cases was the use of real child actors, as opposed to virtual images, and the latter was held to be within the bounds of the First Amendment. However, not everyone agreed with this proposition: "Of even more serious concern is the prospect that defendants indicted for the production, distribution, or possession of actual child pornography may evade liability by claiming that the images attributed to them are in fact computer-generated." *Ashcroft*, 535 U.S. at 263 (O'Connor, J., dissenting).

The Court also held "an Internet user who solicits child pornography from an undercover agent violates the [PROTECT Act], even if the officer possesses no child pornography. Likewise, a person who advertises virtual child pornography as depicting actual children also falls within the reach of the [PROTECT Act]." *United States v. Williams*, 553 U.S. 285, 293 (2008). Thus, even subsequent to *Ashcroft v. Free Speech Coal.*, the Supreme Court has not uniformly required the government to prove actual children were used in the production of child pornography for the conduct to fall within scope of the PROTECT Act.