Constitutional Restrictions on Erotic Speech Under the First Amendment

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Introduction

* Presenter Background

* Historical Hostility Toward Erotic Media

* Recent Societal / Technological Changes

* Goals for Presentation

The Video Store Wars

- 1980's brought about dramatic changes in the production and distribution of erotica.
- The VCR allowed individuals to view adult material in the privacy of their own home.
- Production and distribution costs cut.
- Content became more risqué.
- Obscenity prosecutions proliferated.



Restrictions on Erotic Speech

- Sexually oriented speech – Overview:
  - Unprotected erotic speech:
    - Obscenity
    - Child pornography
  - Adult pornography – presumed to be protected. *Ashcroft v. ACLU.*
  - Exposure to Minors
    - Indecency Laws
    - Violence



Presumption of Protection

- Presumption of First Amendment protection even if speech is erotic in nature
  - Only exceptions are Obscenity and Child Pornography
  - Issues with Possession:
    - Obscenity can be legally possessed in the home; *Stanley v. Georgia,* 394 U.S. 557 (1969)
    - Possession of underage material is still illegal – Split decisions:
      - Viewing v. Downloading
      - Knowledge of existence of underage material / Constructive Possession

More than Words…

- First Amendment protects more than mere words
  - Expression v. speech
    - Activity designed to convey a message is protected:
      - Nude Dancing
      - Flag Burning
- Production of Erotica?
    - Probably protected activity
    - CA and NH are the only states where production specifically deemed legal
    - Other states – prostitution is an open question
    - But Note: text and cartoons have been deemed obscene



Violent Speech



- Not sufficient to justify restrictions on expression
- *Brown v. Entertainment Merchants Assn.*, 564 U.S. --, 131 S.Ct. 2729 (2011)(invalidating California's violent video game law)
- *U.S. v Stevens,* 559 U.S. 460, 130 S.Ct. 1577 (2010)
  - Prohibition on "Animal cruelty videos"
  - Government's attempt to deal with problem was immensely overbroad

Q: Sadomasochistic content.

Sentencing enhancements – federal level

Issues with obtaining valid model release

Obscenity



- *Miller* Test
  - *Miller v. California*, 413, U.S. 15 (1973)
    - 3 prongs
      - Whether "the average person, applying contemporary community standards," would find that the work, taken as a whole appeals to the prurient interest
      - Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law
      - Whether the work, taken as a whole lacks serious literary, artistic, political or scientific value
- All 3 prongs must be satisfied for the work to be considered obscene

Contemporary Federal Obscenity Cases

US. v. Extreme Associates, 431 F.3d 150 (3d Cir. 2005) - Husband and wife defendants sentenced to a year in prison for creating allegedly obscene material and mailing it across state lines

United States v. Little, 365 F. App'x 159 (11th Cir. 2010) – Adult content producer, Max Hardcore, sentenced to five years in prison for obscenity violations in the Middle District of Florida

United States v. Stagliano, 729 F.Supp.2d 215 (D.D.C. 2010) – obscenity case against adult content producer, John Stagliano, ultimately dismissed in an embarrassing loss to the DOJ

Florida Obscenity Cases

- Tammy Robinson
- Chris Wilson
- Clint McGowan
- Theresa Taylor (a.k.a. Kimberly Kupps)



THE IMPACT OF THE INTERNET



- Is the Internet changing views/opinions on erotic material?
- Technology permits widespread/accessible use
- Laptop, tablet and smart phone consumption soaring – allows for greater user privacy
- The mainstreaming of erotica

Obscenity in the Digital Age

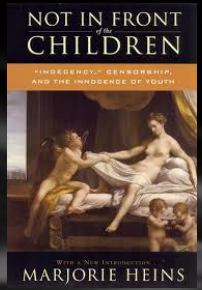


- Decline in prosecutions, but still a reality
  - AG Eric Holder disbanded Obscenity Prosecution Task Force
  - DOJ: choose to concentrate on "most egregious" cases → those involving child exploitation
- Difficulties with applying *Miller* Test in Digital Age
  - What is the 'community'?
  - Basis for obscenity restrictions undermined by private transmission
  - Morality in Media donations sharply decline
  - Feminists focus more on education

Child Pornography

- 18 U.S.C. Ch. 110: Sexual Exploitation & Other Abuse of Children
  - §2256 – Defines child pornography
  - §§ 2251; 2252, 2252A - Illegal to produce, sell, traffic, possess, receive, "visual depiction of a minor engaged in sexually explicit conduct" – Definitions governed by the *Dost* Factors (*U.S. v. Dost*, 636 F. Supp. 828 (S.D. CA 1986)
  - Elements, generally:
    - Prosecution NOT required to prove defendant's knowledge of minor's age in prosecutions against producers
    - Effectively makes sexual exploitation statutes strict liability offenses
      - Regardless of consent or misrepresentation by minor
      - But see; *U.S. v. X-Citement Video* 513 U.S. 64 (1994) – 'knowledge' requirement 'read into' the statute regarding all but original producers of the material
  - §2258A-E – Reporting requirements for online service providers regarding underage material and exploitation activities
- Major Cases
  - *NY v. Ferber* 458 U.S. 747 (1982)
  - *Osborne v. Ohio* 495 U.S. 103 (1990)

Indecency Laws

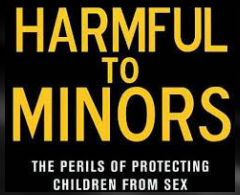


- Federal indecency regulations
  - **Communications Decency**
  - **Act** of 1996 ("CDA")
    - 47 U.S.C.§ 223 – "Anti-Indecency Provision"

Reno v. ACLU, 521 U.S. 844 (1997) – SCOTUS struck down the anti-indecency provision of CDA as unconstitutional under the First Amendment (*unanimous* decision)

- Government's first attempt to require blocking of access by minors to adult websites
- SCOTUS struck down 47 U.S.C. § 223 as unconstitutional under the First Amendment as an overbroad, content based restriction on speech
- Law created criminal penalties for transmissions of indecent communications

Harmful to Minors



- **COPA** [47 U.S.C. s. 231(a)(1) - Child Online Protection Act – 1998]
  - Passed as a response to *Reno v. ACLU* with intent to restrict minors' access to any online material defined as "harmful to minors"
  - Penalties: up to $50K in fines and 6 months' imprisonment for knowingly posting content that was harmful to minors on the internet for commercial purposes
  - Made it illegal only to operate a commercial site (as opposed to a private chat room) that made sexually explicit material available to minors
  - Such sexually explicit material had to be considered "harmful to minors" not just "indecent"

Ashcroft v. ACLU

Ashcroft v. ACLU, 535 U.S. 564 (2002) – COPA struck down after a decade-long litigation battle

- 1999 – Eastern Dist. of PA judge blocked enforcement of COPA and the ruling was appealed to the Third Circuit
- 2000 – Third Circuit affirms unconstitutionality of COPA, finding that could not apply "contemporary community standards" to the Internet and the case was appealed to SCOTUS
- 2002 – SCOTUS vacated the lower court's opinion and remanded the case for further proceedings on the constitutional ramifications of COPA
- 2003 - On remand the Third Circuit again affirmed the district court's preliminary injunction and a second appeal to SCOTUS is attempted
- 2004 – SCOTUS found that too much time elapsed from the original appeal for the court to make a decision so the case was sent back to the district court for a full trial on the merits
- 2007 – On remand, the district court declared COPA unconstitutional [*American Civil Liberties Union v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007)]
- 2008 – The Third Circuit again concurred with the findings of the trial court and found the law unconstitutional
- 2009 – SCOTUS refuses to hear the appeal, effectively striking COPA from the US code, with the law never having taken effect.

Efforts to Protect Minors



Website Operator Obligations Regarding Minors

- New legal challenges for protecting minors as technology evolves
  - Access to material
  - Age verification: landing/splash page, active assent confirming user's age

Erotic Content Producer Obligations

- 18 U.S.C. 2257 – Records Keeping & Labeling -(**Compliance / Exemptions)**
  - Imposes records keeping and labeling obligations on those who produce or publish sexually explicit material
  - Exemption: Social Networking sites not acting as a "producer" – depends on content publication/upload procedure
  - Legal Challenge – *FSC v. Holder,* 677 F.3d 519 (3d. Cir. 2012). Decision pending.

Indecency Laws – State Level

- *American Book Sellers Foundation for Free Expression v. Dean*, 202 F. Supp. 2d 300 (D. Vt. 2002)
- *PSINet, Inc. v. Chapman*, 167 F. Supp. 878 (W.D. Pa. 2001), question certified, 317 F.3d 413 (4th Cir. 2003)
- *Cyberspace Communications, Inc. v. Engler*, 142 F. Supp. 2d 827 (E.D. Mich. 2001)
- *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999)
- *American Libraries Association v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997)
- *Center for Democracy & Technology v. Pappert*, 337 F. Supp. 2d 2006 (E.D. PA 2004)
- *Southeast Booksellers Ass'n v. McMaster*, 371 F. Supp. 2d 773 (D.S.C. 2005)

The Chilling Effect

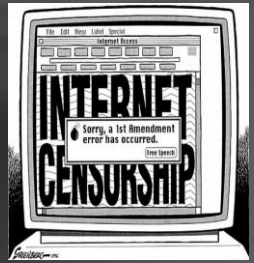
- The First Amendment prohibits government actions that create a chilling effect on speech. *Lamont v. Postmaster General,* 381 U.S. 301 (1965) [mere existence of a law requiring return of post card requesting delivery of certain categories of controversial mail]
- The "chilling effect" referred to in the case was a "deterrent effect" on freedom of expression—even when there is no law explicitly prohibiting it
- What is the impact of other targeted regulatory laws?
  - Section 2257 Records Keeping
  - Mandatory Condom Laws – LA County
  - Employee Records Laws in Adult Businesses



CENSORSHIP, INTNL.

- Some countries have imposed bans on various forms of erotic speech – unconstitutional in the United States
- Porn Bans: Iceland, EU, UK
  - Reasoning for bans:
    - Personal harm to females participating (Iceland)
    - Social harm to children exposed to it (EU / UK)
  - Unlikely to be effective:
    - Logistical nightmare because dealing with technology and definitions
    - Black Market
    - Alternative Sources for Material
    - Prohibitions might change behavior but change in behavior does not mean alleged "problem" was solved – merely proves that it has gone underground





The Evils of Censorship

"There is more than one way to burn a book. And the world is full of people running about with lit matches."

-Ray Bradbury

Censorship reflects society's lack of confidence in itself.

It is a hallmark of an authoritarian regime.

~Potter Stewart

Conclusions

- Erotic entertainment has become ingrained in the mainstream of society
- Internet usage soaring in the U.S. and globally
- Sexual expression is a human right
- Free society is about choice:
  - Free speech rights
  - Sexual intimacy
  - Personal autonomy
  - The right to be left alone

