

Info2Go! What does "obscene" or "harmful to minors" mean exactly?

Join us to learn about the legal context of challenges to library materials, including U.S. Supreme Court decisions on obscenity and other First Amendment issues.

Presenter: Benjamin Plener Cover, Associate Professor of Law, University of Idaho School of Law



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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.**

Understanding the First Amendment

- Literal Reading
 - *What does 1A say?*
- Popular Understanding
 - *What do people say about 1A?*
- Constitutional Doctrine
 - *What does SCOTUS say about 1A?*

Constitutional Doctrine

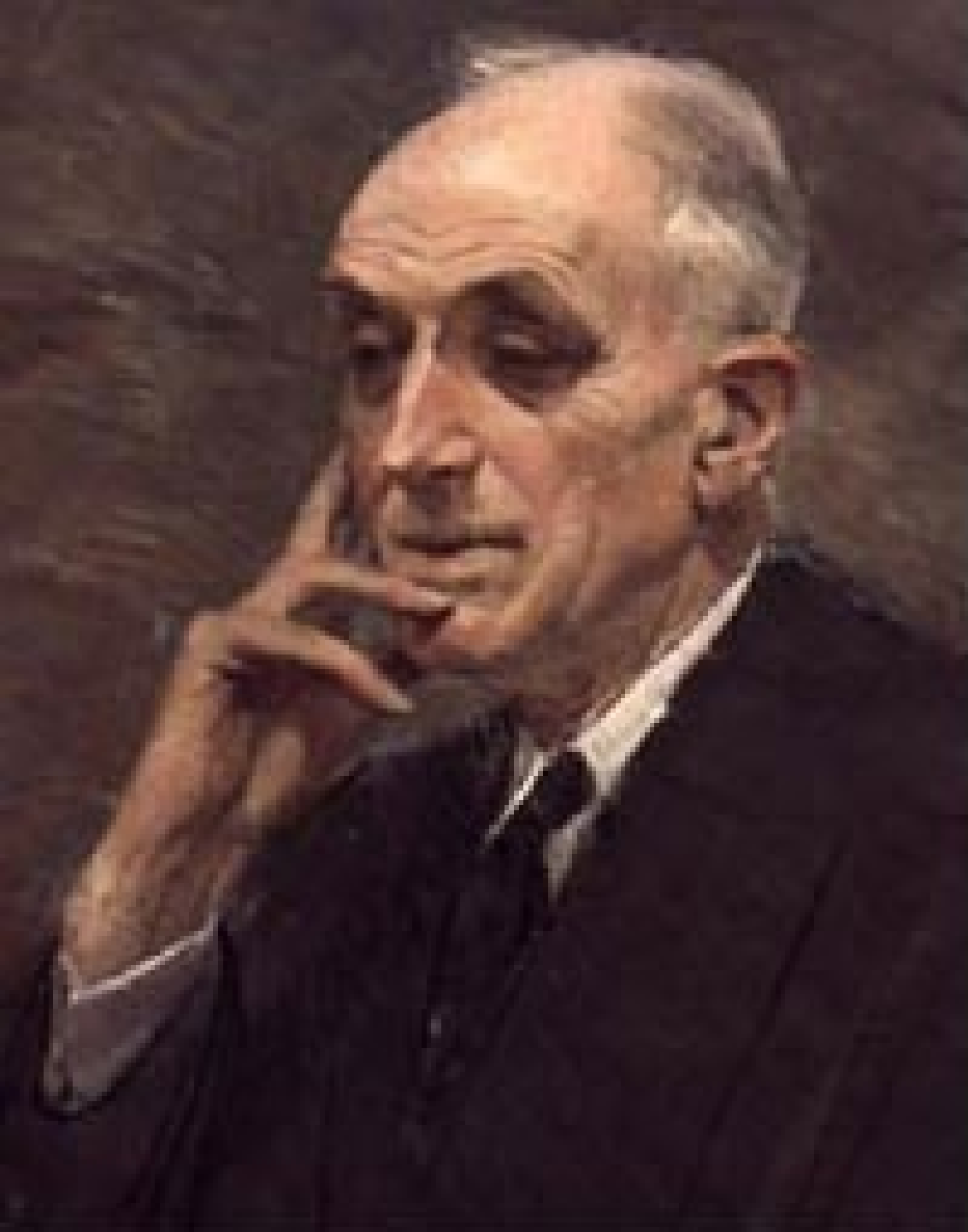
- **All government**
- **Only government**
- **Unenumerated rights**
- **Unprotected categories**

3 Unprotected Categories

1. Obscenity

2. Harmful to Minors

3. Child Pornography



The subject of obscenity has produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication.

- Justice John Marshal Harlan II



***I know it when
I see it.***

- Justice Potter Stewart

The *Miller* Test

1. Whether 'the **average** person, applying **contemporary community** standards' would find that the work, **taken 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, **taken as a whole**, **lacks serious literary, artistic, political, or scientific value**.

The *Miller* Test

1. prurient interest
2. patently offensive
3. low/no value

1. prurient interest

- “having a tendency to excite lustful thoughts”
- “a shameful or morbid interest in nudity, sex, or excretion”
- work taken as a whole
- average person applying contemporary community standards

2. patently offensive

- work depicts or describes sexual conduct**
- specifically defined by applicable state law**
- in a patently offensive way**

2. patently offensive

- **“representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.”**
- **“representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.”**

3. low/no value

- **work taken as a whole**
- **lacks serious value**
- **literary, artistic, political, scientific**
- **e.g. medical books include graphic depictions of human anatomy**

The *Miller* Test

- ultimately applied by jury at criminal trial
- but subject to independent appellate review
- **pruriency** and **offensiveness** based on local, not national, community standards
- community excludes children but includes sensitive adults
- local standard for the internet?
- **value** based on objective reasonableness standard

Ginsberg v. New York (1968)

- **state can prohibit distribution *to minors* of material that is obscene *for minors***
- **state may “adjust the definition of obscenity to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests . . . of such minors.”**
- **same 3-part test: prurience, offensiveness, value**

Harmful to Minors

Miller-Ginsberg Test

1. 'The **average** person, applying **contemporary community** standards' would find that the work, **taken as a whole**, appeals to the **prurient interest of minors** ;
2. The work depicts or describes, **sexual conduct specifically defined** by state law in a way that is **patently offensive for minors**
3. The work, **taken as a whole**, lacks serious literary, artistic, political, or scientific value **for minors**.

Ginsberg v. New York (1968)

- **Variable obscenity** – whether a book is obscene depends on its audience
- The same book may be *obscene* for *children* but *non-obscene* for adults
- The state *can punish* distribution of this book *to children*
- The state *cannot punish* distribution of this book *to adults*

Child Pornography

- **Distinct category of unprotected speech**
- **Involves child actors, not youthful adults or computer animation**
- **Harm is the abuse and exploitation of children**
- **State cannot prosecute a person for possessing obscene materials in their home**
- **But state can prosecute a person for possessing child pornography in their home**

Harmful to Minors

Miller-Ginsberg Test

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Virginia v. Am. Booksellers Ass'n (1988)

- “It shall be unlawful for any person ... to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse” visual or written material that “depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles.”
- Va.Code § 18.2–391(a) (Supp.1987).

Virginia v. Am. Booksellers Ass'n (1988)

- booksellers sued
- booksellers cited 16 books allegedly covered
- trial court found 5%-25% of bookstore covered
- SCOTUS certified Qs to VSC
- Are these books covered?
- What about varying ages?

16 books

- R. Bell, *Changing Bodies, Changing Lives* (1980)
- J. Betancourt, *Am I Normal?* (1983)
- J. Blume, *Forever ...* (1975)
- P. Blumstein & P. Schwartz, *American Couples* (1983)
- J. Collins, *Hollywood Wives* (1983)
- A. Comfort & J. Comfort, *The Facts of Love* (1979)
- S. Donaldson, *Lord Foul's Bane* (1977)
- *The Family of Woman* (J. Mason ed. 1979)

16 books

- P. Haines, *The Diamond Waterfall* (1984)
- J. Joyce, *Ulysses* (1961)
- J. Lindsey, *Tender is the Storm* (1985)
- *The New Our Bodies, Ourselves* (J. Pincus and W. Sanford ed. 1984)
- L. Niven & J. Pournelle, *Lucifer's Hammer* (1977)
- *The Penguin Book of Love Poetry* (J. Stallworthy ed. 1973)
- M. Sheffield, *Where Do Babies Come From?* (1972)
- J. Updike, *The Witches of Eastwick* (1984).

Virginia Supreme Court

- “if a work is found to have a serious literary, artistic, political or scientific value for a **legitimate minority of normal, older adolescents**, then it cannot be said to lack such value for the entire class of juveniles taken as a whole.”
- “Because none of [the 16 books] meets the **third prong** of the tripartite test, we hold that none of the books is ‘harmful to juveniles’ within the meaning of Code §§ 18.2–390 and 391.”

Harmful to Minors

Miller-Ginsberg Test

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Forever...

A NOVEL BY *Judy Blume*



C H A N G I N G

BODIES

C H A N G I N G

LIVES