

Indecency & Adult Pornography

CJ341 – Cyberlaw & Cybercrime Lecture #6

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Topics

- Freedom of Speech
- First Amendment of the US Constitution
- Pornography and Culture
- Pornography in the USA
- Obscenity
- Effects of Pornography
- Legislation
- The Brian Dalton Case



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Freedom of Speech

- Freedom of expression
- Oral and written
- From governmental prior restraint
- Except as such expression constitutes
 - ❑ Libel
 - ❑ Slander
 - ❑ Obscenity,
 - ❑ Sedition, or
 - ❑ Criminal conduct such as
 - ✓ Bribery,
 - ✓ Perjury, or
 - ✓ Incitement to riot

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First Amendment of the US Constitution

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.

Pornography and Culture

- Definitions of pornography vary in space and time
- Scandinavian countries have far less concern about nudity than USA
- Some Muslim countries view any sight of a woman's body except the eyes as indecent and provocative
- Saudi Arabian censorship concerned primarily with preventing views of women in positions of autonomy and authority
- African tribal women who habitually go bare-breasted laughed upon hearing of American men's reactions: "You mean they act like babies??"

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The Schema Influences Perceptions

- Cognitive framework
- What allows observations to make sense
- We interpret observations in context
 - ❑ Imagine that your colleague appears at work dressed like this:
 - ❑ But what if your colleagues is at the company swimming pool?
 - ❑ Results in radically different interpretation from schema for the business meeting. . . .
- In security, schema for *normal politeness* conflicts with schema for *secure behavior*



This slide is from IS342 notes.

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Pornography in the USA

- Sexually explicit
- Films, magazines, writings, photographs, or other materials
- Intended to arouse sexual excitement in their audience
- Word is derived from the Greek *πορνέ* (*pornē* -- prostitute) and *γραφειν* (*graphein* -- to write)
- Distinct from *obscenity*



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Obscenity

- Obscenity difficult to define
- Miller Test, AKA "community standards" used to determine whether expression has crossed the line from pornography to obscenity
 1. Would the "average person," applying "contemporary community standards," find the work, taken as a whole, appeals to the "prurient interest"?
 2. Does the work depict or describe, in a "patently offensive way," sexual conduct specifically defined by applicable state law?
 3. Does the work, taken as a whole, lack "serious" literary, artistic, political, or scientific value?
- Problems for the Internet – global reach, universal access
 - ❑ Which community?
 - ❑ Whose standards?

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Effects of Pornography

- Highly controversial subject
- Opponents of pornography assert association with "immorality, sexual violence, and negative attitudes toward women" [Microsoft ® Encarta ® 2006]
- Proponents claim harmless
- Violent pornography usually classed separately
 - ❑ Studies involved measuring aspects of aggressivity & arousal after various kinds of porn
 - ❑ But research findings highly contested

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The Conservative View

- Sexuality should be restrained
 - ❑ Limited by and to marriage
 - ❑ Restricted in expression
- Pornography encourages evils
 - ❑ Increases depersonalized sexual arousal
 - ❑ Increases recreational sex
 - ❑ Undermines marriage
 - ❑ Increases sexual violence



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Feminist Analysis

- Pornography degrades & dehumanizes women
- Focus is power, not sexuality
 - ❑ Women are sex-objects
 - ❑ Exist only to please men
- But many feminists also oppose censorship
 - ❑ Distinguish between porn and erotica
 - ❑ Depend on free speech for progress

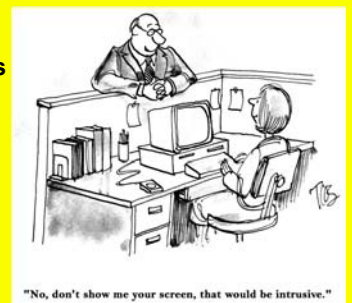


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Liberal or Civil-Libertarian Views

- Consensual and voluntary sexual activity are private matters
 - ❑ Provided there is no harm to others
- Pornography is expression of individual preferences
- Skeptical of claims about positive harm from porn
- Oppose censorship on principle



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History of US Law on Pornography



- Tariff Act of 1842 barred importation of all “indecent and obscene prints, paintings, lithographs, engravings, and transparencies.”
- New York Society for Suppression of Vice became active in late 19th century
 - ❑ Anthony Comstock (1844-1915) was leader
- “Comstock Law:” 1873 amendment to 1865 Postal Act
 - ❑ Prohibited sending obscene materials through US mails
 - ❑ Included all reference to abortion or birth control



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Legislation (cont'd)



- From 1842 to 1956, Congress passed 20 obscenity laws
- Prosecuted authors and publishers of now-famous books
 - ❑ *Ulysses* (1922) by James Joyce*
 - ❑ *An American Tragedy* (1925) by Theodore Dreiser
 - ❑ *Lady Chatterley's Lover* (1928) by D. H. Lawrence



* But in 1930s federal courts overruled restrictions and allowed *Ulysses* into the US

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Review of Significant Laws & Cases



- CDA
- COPA
- CIPA
- Brian Dalton Case

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CDA (1996)



- Communications Decency Act
 - ❑ Crime to send obscene or “indecent” or “patently offensive” content over Internet
 - ❑ If recipient known to be <18 years old
- SCOTUS (1997): CDA unconstitutional
 - ❑ Justice John Paul Stevens: “...[T]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.”



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COPA (1997)



- Child Online Protection Act
 - ❑ AKA “Son of CDA”
 - ❑ Commercial Web sites and ISPs
 - ❑ Must ensure that children could not access materials “harmful to minors”
 - ❑ Prohibited material that “depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact.”
- Federal appeals court blocked COPA in 1999 on free-speech grounds



Image from the *Wall Street Journal* of January 21, 2009
 < <http://blogs.wsj.com/law/2009/01/21/child-online-protection-act-gets-no-love-from-high-court/> >
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CIPA (2000)



- Children's Internet Protection Act
 - ❑ All public schools and libraries
 - ❑ Receiving federal technology funds
 - ❑ Must install filtering software to block access to pornographic sites
- Coalition of civil liberties groups challenged
 - ❑ ACLU (American Civil Liberties Union)
 - ❑ ALA (American Library Association)
- Argued filtering far too imprecise – blocked non-pornographic sites (e.g., birth control)



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CIPA (cont'd)

- Federal judicial panel struck down law 2002
 - ❑ Software was blocking access to sites whose content was protected under 1st Amendment
- SCOTUS 2003
 - ❑ Reversed lower court
 - ❑ Ruled CIPA *constitutional*
 - ❑ “[J]ustified by the government’s legitimate interest in protecting children from harmful materials.”
[Microsoft ® Encarta ® 2006.]
 - ❑ Noted that librarians could override software to permit access when asked by patrons



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The Brian Dalton Case

- See
PRIVATE WRITINGS AND THE FIRST AMENDMENT: THE CASE OF BRIAN DALTON
by Matthew Sostrin (2003).
- http://home.law.uiuc.edu/lrev/publications/2000s/2003/2003_3/sostrin.pdf



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Dalton (cont'd)

- 1998: Brian Dalton convicted of pandering obscenity because he downloaded child porn
 - ❑ Served 4 months of 18-month prison term
 - ❑ Released on parole that forbade any contact with pornography
- 2001: parole officer discovered diary describing violent pornographic fantasies about children
- Charged under statute for pandering obscenity involving a minor
- Pleaded guilty but withdrew guilty plea:
< <http://tinyurl.com/3bfttlv> >
- Sentenced to 7 years in prison

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Dalton (cont'd)

- Questions raised about constitutionality of this judgement (but not in court)
- Existing case law justified view that courts can punish written expression that qualifies as obscene
- But there was never evidence that diary was published or intended for publication of any sort
- In *Stanley v. Georgia*, SCOTUS
 - ❑ “ruled that the mere private possession of obscenity cannot be punished”
 - ❑ “cannot constitutionally premise legislation on the desirability of controlling a person’s private thoughts.”

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Dalton (cont'd)

Sostrin (2003) writes:

“Brian Dalton’s case presents a complicated interplay between obscenity and child pornography law. Under current precedent, Dalton’s writings cannot be punished as obscenity because he has a right to possess them within his home, and made no attempt to otherwise distribute the material. Nor can they be punished as child pornography since the diary only contained words. Although a general extension of child pornography regulations to all written material would be inappropriate, the actions of known pedophiles must be scrutinized more closely to prevent future child abuse.”

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Dalton (cont'd)

Sostrin completes his analysis as follows:

“Recognizing that such speech could incite child abuse provides a potential basis for regulation. However, given the lack of evidence establishing a clear link between writing such fantasies and subsequent illegal action, such an approach is inappropriate. Such a broad interpretation of the incitement of illegal conduct doctrine is also unnecessary in light of the State’s power to civilly commit dangerous sex offenders. Civil commitment provides a narrower remedy to control those posing the most substantial danger to society. Thus, if Ohio is truly concerned about Brian Dalton, it should move for civil commitment, and not punish him solely for the content of his personal diary.”

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Other US Regulations re Pornography and Indecency



➤ FCC regulations

- ❑ Legally-binding restrictions on broadcast speech and other content

- ❑ Applied *in context* *

➤ TV Parental Guidelines

- ❑ Voluntary guidelines

➤ MPAA movie ratings

- ❑ Voluntary guidelines

* See for example FCC 05-23 (2005). "In the Matter of Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film 'Saving Private Ryan.'" http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-23A1.pdf

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US FCC regulations



➤ Regulation of Obscenity, Indecency and Profanity

- ❑ <http://www.fcc.gov/eb/oip/Welcome.html>

➤ Violation of federal law to air *obscene* programming at any time

➤ Violation of federal law to broadcast *indecent* or *profane* programming during certain hours (6 am – 10 pm local time)

➤ FCC can fine, revoke license, deny renewal

➤ Violators subject to criminal fines and/or imprisonment (up to 2 years)



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FCC (cont'd)



➤ Generally does not apply to cable TV, satellite TV or satellite radio

- ❑ These are not available by accident

➤ 2004: statistics on enforcement cases

- ❑ 12 cases
- ❑ >100K complaints
- ❑ Fines of ~\$8M

➤ Bush Administration toughened enforcement penalties in early 2000s

- ❑ Fines based on *each* indecent utterance in a broadcast
- ❑ Instead of fine for entire broadcast



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FCC's Seven Forbidden Words



➤ Seven words specifically forbidden by FCC on public airwaves – occasion fines:

- ❑ *Cocksucker*
- ❑ *Cunt*
- ❑ *Fuck*
- ❑ *Motherfucker*
- ❑ *Piss*
- ❑ *Shit*
- ❑ *Tits*

SOMETHING TO THINK ABOUT:
What are the differences between writing these words onto a slide for a lecture on profanity versus using them in class in conversation or saying them on the radio or TV?

➤ In 2006, the FCC added *Bullshit* to the list*

* See Jarvis, J. (2006). "In defense of bullshit: The big chill of the censor." *The Guardian* (Apr 3, 2006). <http://www.buzzmachine.com/bs/>

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US TV Parental Guidelines



➤ Began 1997

- ❑ Voluntary participation by broadcast & cable networks
- ❑ Also basis of V-chip installed in TV sets manufactured for US use since 2000

➤ Ratings:

- ❑ TV-Y (all children)
- ❑ TV-Y7 (older children)
- ❑ TV-G (general audience)
- ❑ TV-PG (parental guidance)
- ❑ TV-14 (parents strongly cautioned)
- ❑ TV-MA (17+; subsets include ratings for Violence, Sexual Content & Language)



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US MPAA film ratings



➤ Began 1968

- ❑ Voluntary
- ❑ All domestic films rated for use in theaters
- ❑ Unrated versions available on DVD

➤ Ratings include

- ❑ G (general audiences)
- ❑ PG (parental guidance)
- ❑ PG-13 (parents strongly cautioned)
- ❑ R (restricted: under 17 only with parent or other adult *guardian*)
- ❑ NC-17 (restricted: no one under 17 at all)

➤ "X" rating was abandoned in 1990 due to usage by pornography industry

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DISCUSSION