Reel American Heroes Foundation Policy Paper

THE FIRST AMENDMENT DOES NOT PROTECT PORNOGRAPHY

by William J. Olson & Rick Boyer

Introduction to First Amendment

State and local governments have "police powers" which enable those governments to protect the health, safety, and morals of their residents. The First Amendment was never intended to protect pornography, but since the middle of the Twentieth Century, whenever state and local governments have attempted to exercise these powers to restrict pornography, they have been sued for violation of the First Amendment. Federal and state judges frequently rule for the pornographers and enjoined state laws and local ordinances. The jurisprudence of pornography has changed over the years, but the nation has now arrived at a point where there are few remaining limits on pornography, and such limits as exist generally involve protection of children.

Judges have badly abused the First Amendment, twisting its meaning to give protection to pornographic material that the Framers of that Amendment, which was ratified in 1791, never envisioned. Like all provisions of the Constitution, the First Amendment should be interpreted according to its original public meaning when it was ratified. An examination of its original public meaning demonstrates that the First Amendment provides no protection for pornography and pornographers. Rather, state and local government should have authority to criminalize this activity.

Reel American Heroes Foundation

In a world that's constantly changing, few aspects of human society have transformed as dramatically as access to pornography. In the past half-century, adult content has become more and more accessible, first through still images, then magazines, and X-rated films. Today with the internet on cell phones, social media, and lack of restrictions on adult content, put pornography within the reach of almost every child.

Adult content is being pushed on our children into our devices and our lives without our consent. But it doesn't need to stay this way. RAHF is committed to fighting back to protect our children. This RAHF paper demonstrates that pornography is entitled to no constitutional protection. RAHF's upcoming documentary series will explore the ever-changing landscape of technology as it merges with America's obsession with sex and how we can stop the Erotic Erosion of our moral foundation.

Reel American Heroes Foundation
P.O. Box 1017
Roseville, CA 95678
info@reelamericanheroesfoundation.org
https://www.reelamericanheroesfoundation.org/

ANALYSIS

I. THE FIRST AMENDMENT WAS NEVER INTENDED TO PROTECT PORNOGRAPHY.

The text of the First Amendment is clear: "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." (Emphasis added.) All cases involving pornography that have been identified involve either the freedom of speech or of the press or both.

The First Amendment cannot be understood by assuming all words constitute protected "speech" or all printed matters as protected "press." **The definite article "the"** used before both "freedom of speech" and "press," indicates that the Framers of the First Amendment were using **terms with established meanings**. The Framers were protecting "**the** freedom of speech," as that term was understood at the time, but certainly not all speech. For example, even today the freedom of speech does not protect a call to imminent lawless violent action. *See Brandenburg v. Ohio*, 395 U.S. 444 (1969). And, the Framers were protecting "*the* freedom … of the press," as that term had been understood at the time, but certainly not all printed matter. For example, even today it does not cover defamation. *See New York Times v. Sullivan*, 376 U.S. 254 (1964). And with respect to the subject of this paper, does not protect child pornography. (The following section explains how obscenity was treated as a crime when the First Amendment was ratified.)

Nonetheless, federal court cases have strayed from the constitutional text in different ways. One of the principle mistakes that courts make in evaluating speech and press rights is to assume that since the constitutional protections relating to speech and press both involved forms of expression, that it would be permissible to substitute the term "**freedom of expression**" for the actual constituitonal text. Freedom of expression is an amorphous, undefinable and limitless with no defined, historical meaning. Recasting the constituitonal text allows the judge to infuse the new term with whatever meaning he desires.

Thus, "freedom of expression" has been used to defend nude dancing. The first case that popularized this approach was *California v. LaRue*, 409 U.S. 109 (1972), where the Court upheld the power of state government to regulate the sale of alcoholic beverages at bars offering nude dancing, but in that case the Court went on to state that "at least some of the performances to which these regulations address themselves are written within the limits of the constitutional protection of freedom of expression." Over the years, this "freedom of expression" doctrine has been referenced in other many cases to strike down statutes that do not violate "the" freedoms of speech and press.

Most Americans have been told so many times that courts have used the First Amendment to strike down laws against pornography, they cannot conceive of the truth — that the First Amendment provides no protection whatsoever to pornography.

II. OBSCENITY WAS TREATED AS A CRIME AT COMMON LAW.

A 1948 Supreme Court decision confirmed that pornography was criminalized at common law: "Acts of gross and open indecency or obscenity, injurious to public morals, are **indictable at common law**, as violative of the public policy that requires from the offender retribution for acts that flaunt accepted standards of conduct. 1 Bishop, Criminal Law (9th ed.), § 500; Wharton, Criminal Law (12th ed.), § 16. *Winters v. New York*, 333 U.S. 507 (1948) (emphasis added).

A decade later, Justice Frankfurter detailed how the common law of **England** criminalizing obscene printed matter was transported to the United States:

> The publication of **obscene printed** matter was clearly established as a **common-law** offense in **England** in 1727 by the case of Rex v. Curl, 2 Str. 788.... The common-law liability was **carried across the Atlantic** before the United States was established and appears early in the States. In 1786, in **New York**, a copyright act specifically stated that "nothing in this Act shall . . . authorise any Person or Persons to . . . publish any Book . . . that may be profane ... injurious to Government, Morals or Religion" .... In **Pennsylvania**, in 1815, a prosecution was founded on common-law liability. Commonwealth v. Sharpless, 2 Serg. & Rawle, 91. And in **Maryland**, when a statute regulating obscene publications was enacted in 1853, it was recited that "although in the judgment of the Legislature, such advertisements and publications are contra bonos mores, and punishable by the common law, it is desirable that the common law in this regard be re-enacted and enforced...." [*Smith v. California*, 361 U.S. 147, 163 n.1 (Frankfurter, J., concurring).]

State law cases cited by Justice Frankfurter are instructive. As early as ... (1711-1712) ... **Massachusetts** enacted a statute which provided 'that whosoever shall be convicted of composing, writing, printing or publishing, of any filthy obscene or prophane Song, Pamphlet ... shall be punished....' Acts of 1711-1712, c. I, Charter of the Province of the Massachusetts-Bay, p. 172 (1759)." *Smith* at 163 n.1 (Frankfurter, J., concurring).

In 1815 **Pennsylvania** convicted Jesse Sharpless for "exhibiting an indecent picture to divers persons for money." The Pennsylvania court cited to British common law convictions for public exposure, and for publication of an obscene book in *King v. Curl* (2 Str. 789, 93 Eng. Rep.). *Commonwealth v. Sharpless*, 2 Serg. & Rawle 91 (Pa. 1815).

Six years later, **Massachusetts** also upheld a conviction for publishing an obscene book. *See Commonwealth v. Holmes*, 17 Mass. 336 (Mass. 1821).

A 1948 **New Jersey** criminal law treatise noted, citing to Blackstone, "At **common law** all open lewdness, grossly scandalous and tending to debauch the morals and manners of the people, is an indictable misdemeanor." I D. O'Regan and F. Schlosser, The Criminal Laws of New Jersey at 588 (Baker, Voorhis and Co: 1942). The treatise added, "[a]ctions of **public indecency** have always been indictable at **common law**, as telling to corrupt the public morals... The publication of an indecent book is indictable at common law." *Id.* (emphasis added).

In 1848, **Michigan** also upheld an indictment for publishing "obscene pictures and books." *People v. Girardin*, 1 Mich. 90 (Mich. 1848).

Vermont's Supreme Court similarly upheld an indictment for publishing an obscene book. *See State v. Brown*, 27 Vt. 619 (Vt. 1855).

In the 1811 **New York** case *People v. Ruggles*, Judge James Kent, writer of the important early treatise "Commentaries on American Law," declared that "[t]hings which corrupt moral sentiment, as obscene actions, prints and writings" were indictable offenses, as they "tend[] to corrupt the morals of the people…." *People v. Ruggles*, 8 Johns. 290, 293-394 (N.Y. 1811).

In 1897, Emlin McClain, Chancellor of the University of Iowa law school, published a criminal law treatise. In the chapter on "obscenity and indecency," he defined indecency as a common law offense.

> The exhibition of an indecent or lewd picture… may be punishable by statute… as an offense against public morals…. Exhibitions of lewd pictures or exposure of the person… [are] acts which have a direct bearing on public morals…. It is not necessary that it be exhibited in a public place…. Any exhibition is in itself a publication and an offense…. A picture is to be deemed lewd and indecent which tends to debauch and corrupt and to rouse in the minds of persons who see it inordinate and lustful desires….[1]

McClain cited the 1857 **Missouri** Supreme Court case of *State v. Appling* for the proposition that "public indecency may be criminal aside from statute," that is, as a common law offense. *Id.* In that case, the Missouri court noted that "the use of vulgar, indecent and obscene words … was an offence at common law, because it was against good morals — against public decency." *State v. Appling*, 25 Mo. 315, 317 (Mo. 1857). The *Appling* court, for its part, cited Blackstone for the proposition that "[a]ll indecent exposure of one's person to the public view, and … all such acts and conduct as are of a nature to corrupt the public morals or to outrage the sense of public decency are indictable, whether committed by words or acts." *Id.*

Another well-known treatise by Francis Wharton, originally published in 1846, parallels McClain. "Where the objective of publication or exhibition is too excite and play upon the sexual passions of others, and when its tendency is to excite such passions, the party making the publication or exhibition is indictable at common law…. If the effect be to deprave and corrupt others, the offense is complete. And any public show or exhibition which outrageous decency, shocks humanity or is contra bonos mores, is punishable at common law as a nuisance."[2]

Perhaps second only to Joseph Story's Commentaries, Thomas Cooley's treatise has been the most influential in America's history. Cooley, confirmed that **obscenity lay outside constitutional safeguards**.[3]

Cooley did not question the power of states to forbid, and even to confiscate,

[1] II E. McClain, A Treatise on the Criminal Law at 320 (Callaghan and Co.: 1897).

[2] II F. Wharton, A Treatise on Criminal Law 772, 7th ed. (Kay & Brother: 1874).

[3] D. Barnhart, "The Oregon Bill of Rights and Obscenity: How Jurisprudence Confounded. Constitutional History." 70 OR. L. REV. 907, 940 (1991) (emphasis added).

indecent publications. "The preservation of the public morals is peculiarly subject to legislative supervision, which may forbid the keeping, exhibition, or sale of indecent books or pictures, and cause their destruction if seized."[4]

In 1896, the Supreme Court upheld a federal statute banning the sending of any "obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character, . . . and every article or thing intended or adapted for any indecent or immoral use" through the U.S. mail. *Rosen v. United States*, 161 U.S. 29, 30 (1896). Notably, the federal statute used the words "obscene" and "indecent" interchangeably; there was no suggestion that something "obscene" could be proscribed while something "indecent" was constitutionally protected.

As late as 1942, the Court continued to hew to the traditional common law view. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which **have never been thought to raise any Constitutional problem**. These include the lewd and obscene…." *Chaplinsky v. N.H.*, 315 U.S. 568, 571-572 (1942) (emphasis added).

While the Jurisprudence of the Supreme Court has strayed badly on this issue, as recently as 1991, only 32 years ago, the U.S. Supreme Court similarly stated: "**Public indecency** statutes … are of ancient origin and presently exist in at least **47 States**. Public indecency, including nudity, was a **criminal** offense at **common law**…." *Barnes v. Glen Theatre*, 501 U.S. 560, 568 (1991). The common law quite simply never protected obscenity.

[4] T. Cooley, A Treatise on the Constitutional Limitations 596 (Little, Brown & Co.: 1868).

III. THE COURTS HAS TWISTED THE FIRST AMENDMENT'S TEXT TO PROTECT PORNOGRAPHY.

Founding Dean of Regent Law School, Herbert W. Titus, correctly asserted that:

> [f]rom … the ratification of the Bill of Rights, until 1957, the … Court had never found the First Amendment even remotely relevant to the constitutionality of a federal or state obscenity law.[5]

That development in 1957 was the Supreme Court's decision in *Roth v. United States*, 354 U.S. 476 (1957), which made radical changes to pornography jurisprudence. The Court's opinion correctly stated "obscenity is not expression protected by the First Amendment" (*id.* at 492) in upholding an 1872-vintage federal statute banning the sending of obscenity through the mail. But the Court went on to make critical errors which contaminated First Amendment jurisprudence ever since.

First, it combined the Constitution's two, distinct First Amendment freedoms of speech and press, into a "freedom of expression."

Second, it created an artificial distinction Between unprotected "Obscenity" and protected "Indecency."

Third, it distinguished between Obscenity and Indecency based on an amorphous test involving "purient interests."

Prior to *Roth*, there had never been a credible historical distinction between obscenity and indecency. Nonetheless, the *Roth* Court asserted that "**obscenity**" is not protected by the First Amendment, and "**indecency**," is protected. Obscenity was

[5] Herbert W. Titus, "Obscenity: Perverting the First Amendment," *The Forecast* at 10 (June 1996).

defined under a multi-part, atextual test, as follows: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489.

Sixteen years later, in *Miller v. California,* 413 U.S. 15 (1973), the Court refined the *Roth* definition for obscenity under a three-part test:

> (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… and
>
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Miller* at 23.

The Court added:

> "Under the holdings announced today, no one will be subject to prosecution for … obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct."

The Court did not define "hard core." *Id.* at 27.

In 1978, the Court finally explained how "obscenity" and "indecency" ostensibly differed, defining "indecency" as simply "nonconformance with accepted standards of morality." *FCC v. Pacifica Found.*, 438 U.S. 726, 740 (1978). In so doing, the Court barred states from prohibiting all but the most extreme and shocking examples of pornography (and it has yet to explain where or when the line is crossed).

But the Court's artificial dichotomy is divorced not only from the text of the First Amendment, but from its history. Under the English common law and through the Founding era, obscenity was a common law offense, with no separate legal meaning for "indecency."

Blackstone described the offense of "open and notorious lewdness," and "grossly scandalous and public indecency."[6] British law established "obscene libel" as meriting criminal sanction, in the famed case of *King v. Curl*, 93 Eng. Rep. 849 (K.B. 1727). In course of time, "the American common law quietly absorbed obscene libel" principles from the English law:[7]

> Obscene and indecent acts of a public nature were always crimes at common law…. [E]xhibitions of obscene or disgusting pictures and acts, indecent exposure of one's privates, and the utterance of obscene and profane language either shocked the public's sense of decency or tended to the corruption of its morals and so were nuisances not to be tolerated.[8]

The Pennsylvania Supreme Court made clear that "obscenity" and "indecency" were one and the same, in the 1815 indecency case of *Commonwealth v. Sharpless*, 2 Serg. & Rawle 91 (Pa. 1815). Citing to *Curl*, the court held that "actions of public indecency,

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[6] Blackstone, Commentaries on the Laws of England abridged, 9th ed. at 442, W. Sprague, ed. (Callahan & Co.: 1915).

[7] W. Strub, Obscenity Rules: Roth v. United States and the Long Struggle Over Sexual Expression at 7. University Press: 2013.

[8] J. Thompson, "The Role of Common Law Concepts in Modern Criminal Jurisprudence (A Symposium) – III Common Law Crimes against Public Morals." J. CRIM. L. AND CRIMINOLOGY 350, 351 (1959).

were always indictable, as tending to corrupt the public morals." *Sharpless*, at 101. The *Sharpless* court used "obscene" and "indecent" as identical terms, describing the picture in question as "representing a man in an obscene, impudent, and indecent posture with a woman."

The Massachusetts Supreme Court followed the same path in 1821, upholding a conviction for publishing a book that contained an obscene print. *Commonwealth v. Holmes*, 17 Mass. 336 (Mass. 1821). The Massachusetts court, too, treated the words "obscene" and "indecent" interchangeably, stating that the publication of "an obscene book or picture" properly subjected the defendant to "punish[ment] for "indecency." *Id.* at 337.

Congress, too, used the words interchangeably, and the First Amendment was not thought to be implicated, when the first federal obscenity statute was enacted to prohibit importation of "all indecent and obscene prints…."[9]

In 1896, in *Swearingen v. United States* (161 U.S. 446), the Court upheld a federal criminal statute that prohibited sending obscene material through the U.S. mail. Under the statute, "every **obscene**, lewd or lascivious book, pamphlet, picture, paper, writing or other publication of an **indecent** character … are hereby declared to be non-mailable matter." *Id.* at 449 (emphasis added). The Court, quite correctly, never considered the First Amendment at all, and instead pointed directly to the common law. The Court noted that "[t]he words 'obscene,' 'lewd' and 'lascivious' … signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law…." *Id.* at 451. Nothing about the Court's common law-based opinion suggested that material involving "immorality which has relation to sexual impurity" must be "hard core" — whatever that is — to be prohibited.

The common law cases align with the traditional — and constitutionally unquestioned — powers of the states to legislate for "the public health, safety and morals." "Public indecency — including public nudity — has long been an offense at common law. See 50 Am. Jur. 2d, Lewdness, Indecency, and Obscenity § 17, pp. 449, 472-474 (1970)." *Barnes* at 573 (Scalia, J., concurring).

The common law cases provide no basis for *Miller's* undefined "hard core" requirement. Rather, they speak to material fitting *FCC v. Pacifica's* "nonconformance with accepted standards of morality." **Never before *Roth* did the Court suggest that the First Amendment protects pornography**, "hard core" or otherwise. Nor is there textual or historical justification for the pretense that the First Amendment protects "indecency" as sacrosanct, but offers no protection for obscenity.

IV. THE SUPREME COURT'S RECENT DECISIONS CONTINUE TO UNDERMINE THE FIRST AMENDMENT AND FAVOR PORNOGRAPHERS.

In 1973, relying on *Roth*, the Court compounded its *Roth* error. In *Miller v. California*, the Court again decreed that the First Amendment does not protect obscenity. But "[t]he actual result has been an almost perfectly absurd one; on the one hand, the Court has peremptorily ruled that obscenity is not protected by the Constitution. However, the Court's rule of law, based as it is upon a misleading standard … is so

[9] W. Strub, Obscenity Rules 12.

malleable … [that] virtually nothing except the most radical evil can be reliably or meaningfully proscribed."[10]

In *Miller*, the Court compounded its *Roth* error of expanding "speech" to anything that might be described as "expression." This time, the Court **equated pictures with speech**. The *Miller* Court proclaimed that "[t]he 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 people approve of the ideas these works represent."

Of course, the Framers could never have conceived of photography, let alone movies, or the Internet. The First Amendment was designed to protect words, not images. "[T]he court failed to recognize the absurdity of the tacit proposition that underlay its opinion: the proposition that photographs of women engaged in acts of self-prostitution and prostitution by others … constitute a form of speech entitled to protection by the First Amendment."[11]

In 1991, the Court revealed just how far its twin errors had gone. In *Barnes v. Glen Theatre*, 501 U.S. 560 (1991), the Court again ostensibly upheld an Indiana statute banning completely nude dancing. But its interpretation of the First Amendment was by now almost entirely divorced from "speech," and the result, though shocking, was predictable . "[N]ude dancing … is **expressive conduct** within the outer perimeters of the First Amendment," the Court stunningly stated. *Id.* at 566 (emphasis added). The "free expression" door remains open. Not only pornography, but laws against prostitution, drug use, and countless more are inevitably suspect.

In 1997, 40 years after *Roth*, the Court delivered the *coup de grace* to protection of children against pornography. In *Reno v. ACLU*, 521 U.S. 844 (year), the Court struck down the **Communications Decency Act**, designed to impose restrictions on distribution of internet pornography where children could easily access it. The Court surrendered any pretense of even trying to couple "expression" with speech, announcing its rule that any "sexual expression which is indecent but not obscene is protected by the First Amendment." The Court did not appear concerned over the shocking implications of its statement, which would appear to in fact admit that "an apparently limitless variety of **conduct** can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Barnes* at 570.

Five years later, in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the Court went so far as to declare that the First Amendment protects pornography depicting children — so long as it is not created using actual children; computer-generated images or images of young adults who appear to be children cannot be banned.

The Court's muddled language highlights the confusion created by *Roth's* failure to read "speech" to mean "speech." "The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought. To preserve these freedoms, and to protect speech for its own sake, the Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct." *Id.* at 253.

The Court ignores the fact that indecent images of children are in no sense "speech," and creation and distribution of such images is in fact far more in the realm of "conduct" than of "speech" (or even of "ideas"). The

[10] Cohen, Unhappy Anniversary 13.

[11] Cohen, Unhappy Anniversary 13.

Court also confuses the fact that there are a limitless supply of "ideas" that, if turned into corresponding conduct, are unquestionably criminal and outside of constitutional protection. Despite its self-congratulatory language about drawing "vital distinctions," in fact the Court's great error is its failure to draw the distinction buried by *Roth*, between "speech" and "expression," which may be entirely conduct without a single component of speech. Rather than drawing important constitutional distinctions, the Court has erased those distinctions. In so doing, the Court has also erased the historic common law guardrails that protected the most vulnerable members of society against its most predatory elements.

The Court's rootless jurisprudence has constitutionalized a "right to pornography" that the First Amendment simply does not protect, and its Framers never envisioned.

Postscript

Careful readers of the First Amendment will note that it begins "Congress shall make no law…." with no reference to states and localities whose laws and ordinances are being struck down by courts. When the Bill of Rights was ratified, it was understood as it was written — to apply only to the national government. *See Barron v. Baltimore*, 32 U.S. 243 (1833). During the Twentieth Century, however, the Supreme Court has taken it upon itself to deem certain rights set out in the Bill of Rights as "fundamental" and central to the concept of ordered liberty." Those favored rights have been "incorporated into the Due Process Clause of the Fourteenth Amendment, which does apply to the states and localities. (The Fourteenth Amendment states "No state shall make or enforce any law which shall … deprive any person of life, liberty, or property, without due process of law….")

The First Amendment's **free speech** protection was incorporated into the Due Process Clause in *Gitlow v. New York*, 268 U.S. 652 (1925), and its **press freedom** was incorporated shortly after, in *Near v. Minnesota*, 283 U.S. 697 (1931). These Supreme Court cases emowered federal courts to strike down state laws restricting pornography. This "incorporation" doctrine today goes unquestioned, and it is discussed here only to show that the Framer's original constituitonal plan was for states to have much greater latitude over matters of morality. It was not the ratification of the Fourteenth Amendment which stripped states of this power, but rather decisions by unelected federal judges to re-interpret the Due Process Clause to empower themselves to strike down state laws.

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Authors

William J. Olson served in three positions in the Reagan Administration. He has filed over 300 amicus briefs in the U.S. Supreme Court as well as lower federal and state courts addressing constitutional, statutory and public policy issues. He practices constitutional law, defending against government excess, at William J. Olson, P.C., Vienna, Virginia.
E-mail wjo@mindspring.com;
visit www.lawandfreedom.com;
follow www.Twitter.com/OlsonLaw.
Rick Boyer practices law at Integrity Law Firm, PLLC, Lynchburg, Virignia.
E-mail Rickboyerlaw@gmail.com;
visit http://integritylawlynchburg.com/.